

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

**ALAN BROSZ, derivatively on behalf of
BIG LOTS, INC.,**

Plaintiff,

v.

STEVEN S. FISHMAN, et al.,

Defendants,

and

BIG LOTS, INC.,

Nominal Defendant.

Civil Action No. 1-13-cv-00753-MHW-NMK

**DECLARATION OF BRETT D. STECKER IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED VERIFIED
SHAREHOLDER DERIVATIVE COMPLAINT OR, IN THE ALTERNATIVE, TO
CONSOLIDATE THIS CASE**

I, Brett D. Stecker, hereby declare as follows under penalty of perjury:

1. I am a partner at The Weiser Law Firm, P.C. counsel for Plaintiff Alan Brosz ("Plaintiff") in the above captioned action. I am licensed to practice in the Commonwealth of Pennsylvania and in the State of New Jersey and admitted *pro hac vice* in the above captioned action. I submit this declaration in support of Plaintiff's Opposition to Defendants' Motion to Dismiss the Amended Verified Shareholder Derivative Complaint or, in the Alternative, to Consolidate This Case. By virtue of my representation of Plaintiff in this action, I have personal knowledge of the facts set forth below and I could and would testify competently to those facts if called to do so.

2. Attached hereto as Exhibit A is a true and correct copy of the transcript of argument in *In re MFW S'holder Litig.*, C.A. No. 6566-CS (consol.) (Del. Ch. Mar. 12, 2013).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 30, 2015

s/ Brett D. Stecker

EXHIBIT A

EFiled: Apr 09 2013 02:34PM EDT

Transaction ID 51694533

Case No. 6566-CS



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MFW SHAREHOLDERS : Consolidated
LITIGATION : Civil Action No. 6566-CS

- - -

Superior Courtroom No. 8B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, March 12, 2013
10:32 a.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Chancellor.

- - -

ORAL ARGUMENT ON DEFENDANTS' MOTIONS FOR SUMMARY
JUDGMENT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

2 PETER B. ANDREWS, ESQ.
Faruqi & Faruqi, LLP

3 -and-

4 CARL L. STINE, ESQ.
MATTHEW INSLEY-PRUITT, ESQ.
of the New York Bar
5 Wolf Popper LLP

-and-

6 JUAN E. MONTEVERDE, ESQ.
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7 Faruqi & Faruqi, LLP

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8 CARMELLA P. KEENER, ESQ.
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12 THOMAS J. ALLINGHAM, II, ESQ.
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15 Perelman, Barry F. Schwartz, and William C.
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Willkie Farr & Gallagher, LLP
24 for Defendants Paul M. Meister, Martha L.
Byorum, Viet D. Dinh, and Carl B. Webb

1 THE COURT: So many people. Welcome,
2 everyone.

3 MR. LAFFERTY: Your Honor, I guess
4 I'll step up first, take care of some introductions.

5 My cocounsel at counsel table, Tariq
6 Mundiya and Todd Cosenza; Mac Measley from my office.
7 Mr. Mundiya is going to make the presentation on
8 behalf of the special committee defendants today.

9 THE COURT: Welcome.

10 ALL COUNSEL: Good morning, Your
11 Honor.

12 MR. ANDREWS: Good morning, Your
13 Honor. Peter Andrews, Faruqi & Faruqi, on behalf of
14 plaintiffs. We have Carl Stine, Wolf Popper, making
15 argument today; and also Mr. Monteverde from Faruqi &
16 Faruqi. We also have Matt Insley-Pruitt from Wolf
17 Popper; Ms. Keener from -- you know, her well. And
18 Ms. Kira German from Gardy & Notis.

19 THE COURT: Welcome, everyone.
20 Good morning, Mr. Allingham.

21 MR. ALLINGHAM: Good morning, Your
22 Honor.

23 Before I begin, let me make a couple
24 of introductions, too. I don't know if Your Honor

1 knows Stephen Fasman, who is the chief legal officer
2 at MacAndrews & Forbes Holdings. I think you do know
3 my colleagues Joe Larkin and Chris Foulds; and
4 Jennifer Raatz I think is perhaps new to the Court.

5 THE COURT: Welcome.

6 MR. ALLINGHAM: May I proceed, Your
7 Honor?

8 THE COURT: You may.

9 MR. ALLINGHAM: First of all, Your
10 Honor, I want to personally thank you for postponing
11 this argument when I was a little under the weather a
12 couple weeks back.

13 THE COURT: No. Everyone is glad
14 you're okay. We were a little worried about you. I
15 mean, there's always been reason to worry about you.

16 (Laughter)

17 MR. ALLINGHAM: Having nothing to
18 do --

19 THE COURT: But this is more vivid.

20 MR. ALLINGHAM: Having nothing to do
21 with my physical health, I'm sure.

22 I don't think -- I probably could have
23 dragged myself in here; but even if I could have, I
24 think that the issues presented on this motion deserve

1 the most careful of attention, both because they have
2 far-reaching implications for our corporate law and
3 also because they have far-reaching implications for
4 the disposition and litigation of shareholder
5 challenges to control transactions in this Court.

6 Here's what I'd like to do today, with
7 the Court's permission. I want to spend a little time
8 discussing the standard of review that should apply to
9 going-private merger transactions and, in particular,
10 the one being challenged here in which MacAndrews &
11 Forbes Holdings, which is 100 percent owned by
12 Ronald Perelman, purchased the roughly 56 percent of
13 the equity of M&F Worldwide, which we all call MFW,
14 that it did not already own. So this is -- has always
15 been treated as and is the classic controller
16 transaction about which there's been considerable
17 discussion in recent years.

18 THE COURT: Even though it's a
19 controller transaction, under the Exchange rules, did
20 the company have a majority of independent directors?

21 MR. ALLINGHAM: Yes.

22 THE COURT: Because it wasn't a
23 majority --

24 MR. ALLINGHAM: Yes. In fact, the

1 company has -- has had, I think, contractual
2 commitments with its subsidiaries to do so, certainly
3 with respect to MFW, and I think as to all the
4 affiliate companies.

5 I don't want to -- I don't want there
6 to be any suspense, Your Honor. I'll argue that the
7 business judgment rule should apply to that
8 transaction because every trace of potential influence
9 that MacAndrews and Mr. Perelman could have wielded
10 over the transaction was voluntarily and conclusively
11 relinquished by them, so that this transaction was
12 consciously designed, intentionally designed,
13 conditioned from the outset on approval by both an
14 independent, fully functioning special committee and,
15 and a majority of MFW's minority stockholders, with
16 both conditions made explicitly nonwaivable from the
17 initial announcement.

18 So this merger fully replicated and
19 was intended and designed to fully replicate a
20 third-party arm's length deal. And just as the
21 business judgment rule under our law clearly applies
22 to a third-party arm's length merger deal, so should
23 it apply to this transaction, because minority
24 stockholders in both situations benefit from exactly

1 the same protections: negotiation of the deal by
2 independent, disinterested, effective, and active
3 bargaining agents, one; and the opportunity on a fully
4 informed basis to accept or reject the product of
5 their agents' bargaining process in a shareholder
6 vote. That, of course, is the issue that has
7 far-reaching implications for our corporate law.

8 THE COURT: You -- you concede, right,
9 that there's one -- there's still one remaining, I
10 suppose, distinction between this, sort of,
11 transaction and a situation where there isn't anything
12 like control, which is that when it's a third-party
13 deal where the voting power of management or any block
14 holder is -- let's just pick a safe number -- under 15
15 to 20 percent, for example, that one of the -- the
16 tools that the board has available to it to make sure
17 that it's getting an optimal deal is the ability to
18 benchmark it against other sales transactions; that
19 that factor is not present in a circumstance like
20 this, because to the extent that MacAndrews & Forbes
21 and Mr. Perelman made clear that they were not
22 sellers, you don't have the same sort of market check.
23 They might have the ability to say no to this
24 transaction and to stop it in the tracks, but they

1 don't have the ability to shop it against other deals.

2 MR. ALLINGHAM: Yes. It's a -- it's a
3 valid point, Your Honor. The -- and it's -- Your
4 Honor has the facts correct.

5 The announcement from the beginning
6 was that MacAndrews was not a seller.

7 THE COURT: Right.

8 MR. ALLINGHAM: That has some
9 practical implications, i.e., that it is unlikely --
10 the special committee, for example, is not required to
11 do a vein act. So to -- to -- to go out and actively
12 shop is, sort of, not a very meaningful exercise.

13 On the other hand, that does not mean
14 that the advisors to the special committee didn't
15 examine, as -- as an analytical exercise, the
16 availability -- the -- the values that might have been
17 created in such a transaction.

18 THE COURT: No; I understand that.
19 It's just that parties don't do futile acts. For
20 example, strategic -- you know, there are
21 implications, as you know, from representing buyers in
22 transactions, to expressing your interest in a
23 situation, because if you express your interest in --
24 for example, in a synergistic deal, it may not be the

1 only synergistic deal that the market has in mind --

2 MR. ALLINGHAM: Certainly true.

3 THE COURT: -- and one in which you
4 then are the baitfish rather than the predator fish
5 could occur to people. And so people -- the
6 willingness of people to engage in search costs or
7 even -- private equity, rather, to engage in search
8 costs, if there is not a likelihood of acceptance, is
9 diminished.

10 MR. ALLINGHAM: Yes.

11 THE COURT: And so somebody could make
12 petro dollars -- Sovereign Wealth could make
13 Mr. Perelman an offer they -- that he couldn't refuse
14 because some sheik, rather than buying an English
15 premier league team or a modeling agency, decides he
16 wants to process checks for Bank of America; right?

17 MR. ALLINGHAM: A plausible scenario.

18 THE COURT: Right. "Whatever the
19 intrinsic value of this is in the minds of the people
20 who wrote Van Gorkum, double it and we'll take this
21 off your hands." That could have happened; right?

22 MR. ALLINGHAM: Well, it --

23 THE COURT: What I'm getting at here
24 is when we're looking at the dynamic, the legal

1 change, right, you're talking about, so the policy
2 issue is on the table, invoking the business judgment
3 rule in essentially a binary process where there's two
4 choices essentially: do a merger with the controller
5 or remain independent; and that if the committee is
6 given the ability to, effectively, say no -- and,
7 frankly, not only the committee to say no, but even if
8 the committee says yes, then the stockholders,
9 independent stockholders, have also the ability to say
10 no for themselves --

11 MR. ALLINGHAM: Right.

12 THE COURT: -- then our law should
13 recognize that and give that business judgment rule
14 protection. Right?

15 MR. ALLINGHAM: That's exactly my
16 point, yes.

17 THE COURT: And we're not looking at a
18 Revlon market -- turning everything into a Revlon
19 thing, because then you're talking about controllers
20 basically saying they have to be willing to sell.

21 MR. ALLINGHAM: That's correct. And
22 I -- and I view Revlon as changing the calculus of
23 directors' calculation of value. That is to say, in a
24 decision to sell the company, we are -- we are -- we

1 are now looking at the highest price, not any number
2 of other considerations.

3 THE COURT: I mean, the directors in
4 this situation should be looking for the highest price
5 they can get; right?

6 MR. ALLINGHAM: That's correct.

7 THE COURT: Well, why is this option
8 open to me? Your friends are going to tell me --
9 they're going to cite four or five cases. They're
10 going to say when there's a controlling stockholder
11 transaction, the entire fairness standard applies.
12 And they're going to be right about that literal
13 quotation; right? We're not going to be able to
14 argue -- you're not going to be able to argue with
15 them about that. They're actually going to be able to
16 cite something that says that, and it will actually
17 have the four-letter word that starts with H and ends
18 with D; right? Hold; right?

19 MR. ALLINGHAM: Yes. My friends do
20 argue that Kahn v Lynch imposes a bright-line test.
21 If it's a controller transaction, then entire
22 fairness, period, end of story.

23 THE COURT: And there are cases that
24 parrot that statement; right?

1 MR. ALLINGHAM: Most recently in
2 Southern Peru in the Supreme Court.

3 I -- I would say, however, Your Honor,
4 that I disagree -- and with respect, I disagree with
5 some statements to this effect in the Cox opinion. I
6 don't think either that, in -- in addressing that
7 argument in Kahn v Lynch, the argument that was being
8 addressed was one that presents these facts. And
9 that's important -- let me just pause.

10 That it did not present these facts is
11 very important, because if you have only one
12 procedural protection or the other procedural
13 protection and not both acting in tandem, you have not
14 sealed off the potential exercise of influence by the
15 controller on the terms of the transaction or the vote
16 to approve the transaction.

17 THE COURT: Because I -- I take it one
18 of your points there is -- about Lynch is that when
19 they're talking about the committee's ability to say
20 no, it was the threat to -- to use the tender offer
21 route --

22 MR. ALLINGHAM: Well, sure.

23 THE COURT: -- and bypass the
24 committee. So as a factual matter, without having

1 both of them up-front, that -- that neither is as --
2 neither works as well without the other because --

3 MR. ALLINGHAM: That --

4 THE COURT: -- because if you have the
5 nonwaivable majority-of-the-minority condition, then
6 the controller can't say to the special committee "If
7 you say no to me, I'm just going to run to the
8 stockholders because" -- or you have the commitment
9 that you won't do a deal without the special
10 committee's approval, you can't run to the
11 stockholders with a tender offer.

12 MR. ALLINGHAM: That's exactly right.
13 And, in fact, our friends concede that in their brief.
14 They say it's -- it's -- it's definitional, almost,
15 that the two acting in tandem are better than one. I
16 think that's important doctrinally when looking at the
17 Kahn v Lynch case because otherwise you have not, in
18 effect, sealed off all windows and doors --

19 THE COURT: Well --

20 MR. ALLINGHAM: -- of control.

21 THE COURT: -- I take it what you're
22 also saying is, pragmatically speaking, it's part of
23 why no one has been able to present the case -- and I
24 think this is where Cox and others -- people read

1 it that way. People look at it, and they say there's
2 a statement that says this applies. Then it says you
3 can do one of these -- if one or the other of these
4 things will give you this burden shift. If you're not
5 sure that you're going to get any benefit for doing
6 both, why would you do both? And, therefore, no one
7 does -- no one did both until your client did both.
8 Is that --

9 MR. ALLINGHAM: I -- I can't say that
10 no one ever did both. It certainly --

11 THE COURT: It was the way they did --

12 MR. ALLINGHAM: There's no opinion
13 that presents those facts.

14 THE COURT: But the way they did both
15 wasn't a commonly the-train-is-leaving-the-station.
16 There's the call from the special committee that's
17 gotten happy to the --

18 MR. ALLINGHAM: Yes.

19 THE COURT: -- plaintiffs' lawyer and
20 they say, "We've gotten to a price with the thing,
21 plus we've added the majority of the minority." And
22 so the majority of the minority gets added, tacked
23 onto the situation as part of the agreed upon --

24 MR. ALLINGHAM: Yes --

1 THE COURT: -- terms --

2 MR. ALLINGHAM: -- not announced from
3 inception, which is what -- which is what makes it
4 effective.

5 THE COURT: Right. And in a weird
6 way, they got the business judgment -- they got
7 something better than the business judgment rule,
8 because they got -- actually at the same time that the
9 special committee got happy, the plaintiffs' lawyers
10 got happy, and there was a negotiated settlement. And
11 so --

12 MR. ALLINGHAM: Yes. The only thing
13 better than the business judgment rule is a release,
14 Your Honor.

15 (Laughter)

16 MR. ALLINGHAM: Let me come back to
17 Your Honor's question, though. My friends do say
18 "It's a bright-line rule and you're bound." And I --
19 I take this Court's insistence on deference to
20 controlling authority.

21 What I would say is that in our
22 reading, Kahn v Lynch is not controlling authority on
23 these facts. We know for a fact that this argument
24 was not presented to Kahn v Lynch. We, therefore,

1 should take it as true that Kahn v Lynch, in whatever
2 language it wrote -- it wrote, the Court wrote --

3 THE COURT: Right.

4 MR. ALLINGHAM: -- was not intending
5 to reject this argument, which was not presented to
6 it. And then I would say, Your Honor -- Your Honor,
7 there is other language in Lynch that suggests that
8 the Court understood what it was doing and what it was
9 not doing.

10 So -- this is also well-known
11 language, Your Honor. The Court said, shortly after
12 the -- the bright-line rule, the -- the exclusive
13 standard -- we reaffirm the exclusive standard -- this
14 language: "Nevertheless, even when an interested
15 cash-out merger transaction receives the informed
16 approval of a majority of [the] minority stockholders
17 or" -- not "and"; "or" -- "an independent committee of
18 disinterested directors, an entire fairness analysis
19 is the only proper standard of review."

20 Now, as I said, the language doesn't
21 say when an interested cash-out transaction receives
22 the approval of a majority of the minority and a
23 committee, which is what it would say, presumably, if
24 the Court was speaking to these facts.

1 So our view -- and we urge the Court
2 to find -- that Lynch includes no holding as to the
3 standard of review for -- for a controller transaction
4 that includes both protections. And doctrinally,
5 again, Your Honor, there's a reason for that. One or
6 the other does not seal off the controller. Both
7 does.

8 THE COURT: And how -- how about
9 Tremont and Emerald Partners and Southern Peru or
10 American Mining or whatever it's called?

11 MR. ALLINGHAM: None presents these
12 facts. Tremont --

13 THE COURT: Is it just, again, the
14 same situation where the Court cites that but isn't
15 presented with the question?

16 MR. ALLINGHAM: Yes. In my view, in
17 fact, you can reach back even farther than Kahn to --
18 to then-Vice Chancellor Jacobs' opinion cited in Kahn.
19 I think in each case the Court was citing to language
20 that did not address my particular fact situation.
21 And the, you know, sort of, exclusivity of the
22 standard of review just persists without reference to
23 the particular facts of the case.

24 THE COURT: Because the Supreme Court

1 has never had a chance to actually be asked it. And
2 to the extent that the market perceived it as
3 uncertain, controllers had no incentive to actually
4 provide both protections to stockholders up-front.

5 MR. ALLINGHAM: That's exactly true.
6 And, in fact, just -- just to -- to finish the point,
7 the -- the alternative language -- the -- the other
8 language that I quoted to you, which is stated in the
9 alternative, is not a mistake, in my view. It's
10 repeated in Southern Peru word for word. So, again,
11 Southern Peru, which presented only one of those
12 protections, states the rule in the alternative.

13 THE COURT: Right. So, like, if you
14 said to your child, "You can go to the movies if you
15 do your math or your English homework," very few
16 adolescent children are going to do both --

17 MR. ALLINGHAM: Both.

18 THE COURT: -- right? Or they're
19 going to be the ones that every other kid hates;
20 right? "I do both."

21 (Laughter)

22 MR. ALLINGHAM: "I'm swell."

23 So that's the first point I want to
24 talk about. And I'll try to -- try to modify what I

1 was going say to take into account what we've already
2 discussed.

3 The second issue I want to turn to,
4 which I think has important implications for
5 challenges in this Court to controller transactions
6 and more generally to challenges in this Court to
7 any -- any M&A transactions, deals with the
8 difference -- and it's a fundamental difference, Your
9 Honor -- between pleadings-based motions to dismiss,
10 on the one hand, and evidentiary-based motions for
11 summary judgment on the other. And that, in turn,
12 implicates what I think is a critical point in this
13 Court: the point at which plaintiffs actually have to
14 begin litigating and proving their claims.

15 This is a motion for summary judgment
16 under Rule 56. That rule imposes obligations on me as
17 the moving party, and it imposes obligations on the
18 nonmoving party as well. What this Court is presented
19 with today is an utter failure of the plaintiffs, the
20 nonmovants, to do what Rule 56 requires; that is, to
21 present evidence of specific facts showing that
22 there's a genuine issue of fact for trial on matters
23 on which I bear the burden, one; and, two -- and what
24 is really important today -- to present evidence of

1 specific -- specific facts showing that they can carry
2 their burden on issues on which they carry the burden.

3 This is not an obligation that's
4 satisfied by a reference to the nonmovants' own
5 pleadings. This is not a Rule 12 motion to dismiss.
6 Evidence of specific facts are required, not merely a
7 promise to present some evidence down the road, not
8 merely a promise that additional discovery is required
9 in order to carry those burdens. Evidence of specific
10 facts now is required --

11 THE COURT: Well, is the big gap --

12 MR. ALLINGHAM: -- under Rule 56.

13 THE COURT: -- in your view, the
14 absence of a -- of an expert report from them on the
15 underlying fairness of the price that was paid?

16 MR. ALLINGHAM: That's certainly true
17 with respect to the price, but there are many other
18 issues and arguments presented, none of which is --
19 is -- is supported by evidence, placed in the context
20 of the legal framework that this Court has to apply to
21 these issues.

22 And on the issue of an expert
23 report --

24 THE COURT: I mean, do you have an

1 expert report or you just have the opinion of
2 Evercore?

3 MR. ALLINGHAM: I have the opinion of
4 Evercore. But the opinion of Evercore in Tanzer and
5 other cases even applies --

6 THE COURT: Oh, no, no, no. I'm not
7 --

8 MR. ALLINGHAM: -- entire fairness, a
9 prima facie showing of fairness.

10 THE COURT: That was the special
11 committee's advisors.

12 MR. ALLINGHAM: It's not telling tales
13 out of school, Your Honor, for me to say that,
14 however, I have an expert. It is not telling tales
15 out of school to suggest that the plaintiffs probably
16 have an expert. And it's certainly true that these
17 lawyers have the ability, because they do it
18 frequently at the PI stage, to present financial
19 expert affidavits on fairness. They're capable of it.
20 They just in this case chose not to do it. And that's
21 okay at a PI hearing, if that's what they want to do.
22 That's okay on a motion to dismiss at the pleading
23 stage, if that's what they want to do. It is not okay
24 under Rule 56 to do it at the evidentiary summary

1 judgment stage.

2 And the consequences of failing to
3 make that showing are stark in the rule. "If the
4 adverse party does not ... respond [to a prima facie
5 showing], summary judgment ... shall be entered
6 against the adverse party."

7 So although we view the question of
8 the appropriate standard of review as -- as an
9 important issue for our corporate law and we view that
10 as an issue under which this Court can and should
11 grant summary judgment, it is not necessary for this
12 Court to determine to apply the business judgment rule
13 in order for summary judgment to be granted here. It
14 can be granted under either of the standard of
15 reviews --

16 THE COURT: But --

17 MR. ALLINGHAM: -- possible.

18 THE COURT: -- your friends would say
19 that -- they would say that -- they would point to the
20 following evidence: that MacAndrews & Forbes timed the
21 offer opportunistically to deal with the market lull
22 so that when they made their offer, it was at a
23 substantial premium to market, but it was timed at a
24 time when the stock price was well below the yearly

1 high; that the projections that the committee used
2 were overly conservative, which was proved by the fact
3 that the company within a calendar year after the deal
4 closed had substantially outperformed the projections
5 on which the deal was priced.

6 And I know you have a response to, in
7 terms of the factual relevance of this, but this
8 impairment analysis, which they say, suggests casts
9 doubt on it; and they obviously criticize some of the
10 multiples used by Evercore and suggest that there's
11 some minor tweaking of the multiple, that the value
12 range used by the financial committee could have --
13 would have materially changed; and that, taken
14 together, that raises a triable issue of fact around
15 the fundamental issue of financial fairness.

16 MR. ALLINGHAM: So I have a -- sort of
17 an overarching response to that, and then I have
18 responses to each of those points.

19 The overarching response is their
20 burden is not to show a triable issue on that fact.
21 The burden is on the plaintiffs now to show the
22 unfairness of this transaction. And they have to do
23 that by evidence.

24 Now, with respect to the points that

1 Your Honor has made, as to what Your Honor calls the
2 market lull, it's true. The stock was down. It's
3 also true --

4 THE COURT: Was the entire market
5 down? Or was it just --

6 MR. ALLINGHAM: I -- I --

7 THE COURT: -- this business?

8 MR. ALLINGHAM: I'm sure we can answer
9 that question for Your Honor, but I can't, off the top
10 of my head, remember.

11 I think -- I think we would then get
12 into issues was the market down in particular sectors.
13 I'm not sure that it's -- that it's an important -- I
14 don't think the market was moving dramatically in that
15 period, but we can find the answer.

16 The real point is it is -- it is
17 uncontested that the price of the stock was down.
18 It's also uncontested that the performance of the
19 company was down. And this is not temporary -- a
20 temporary problem. The critical business of this
21 company, the core business, is check printing. Check
22 printing is a business that is threatened -- and
23 nobody disputes this, not even the plaintiffs -- is
24 threatened by all manner of electronic forms of

1 payment which obviate the need for checks altogether
2 and by -- by the electronic data processing of checks,
3 which obviates the need for printing checks. This is
4 a -- what we used to call in law school, a wasting
5 asset. This is not a business --

6 THE COURT: No, no. I understand.
7 And there's all this testimony about why Mr. Perelman,
8 in particular, likes to buy nearly dead things.

9 (Laughter)

10 THE COURT: It's not -- not quite as
11 grim as those insurance policy things where they --
12 you know, like -- like, they kill -- like, they gave
13 you, like, a million dollars that did really well for
14 three years, but you're going to die on the first
15 day --

16 MR. ALLINGHAM: Your Honor, there --
17 there are opinions in this Court that talk about
18 Mr. Perelman's ability to see some value in mature
19 businesses. That's entirely true. This is a business
20 in which the performance of the core business was
21 clearly deteriorating. We had information during the
22 pendency of this offer that the largest customer by
23 far was, for the first time, going to put its business
24 out to bid, which meant that even if we could retain

1 that volume, it was going to be under price pressure.
2 And that's what happened.

3 THE COURT: No. No. I -- one of the
4 oddments you always have to deal with in this context,
5 right, is you always have a situation where the
6 defendant is coming in to buy something. And the
7 defendant, therefore, in this context always has an
8 incentive to call it stinky in the non-French cheese
9 sense, just stinky, which raises the question of, you
10 know, is it an act of charity or is it perhaps not as
11 stinky as they're making out.

12 MR. ALLINGHAM: And so in terms of the
13 incentives to buy or sell, I understand what Your
14 Honor is saying. And clearly there are always
15 differences of opinion between buyers and sellers;
16 else, there would not be a transaction.

17 THE COURT: Well -- and that's why you
18 get to where -- I thought the key -- and this is where
19 I think the doctrinal difference may make a
20 difference, which is if you're actually down into the
21 -- the dough of it, right, of fairness, it's really
22 pretty hard to miss -- it's really pretty hard to
23 avoid trial, because when you're debating about it,
24 there are debate -- there's a debate about the future

1 of the industry, about this or that.

2 And isn't part of what the doctrinal
3 debate about is if, frankly, you get the benefit of an
4 independent bargaining committee who has the ability
5 to say no? Well, they can say, no and they've
6 negotiated for you. And even more, if you're a mature
7 adult, stockholder, if you don't like what the
8 committee did and you really think the check business
9 is going to go wild, you simply vote no. It's not
10 like a tender decision. It's a vote on a merger. And
11 if you vote no and everybody else votes yes and you
12 don't want to seek appraisal, then you can still take
13 the deal. So it's a totally free vote. You don't
14 have to vote yes.

15 I think that's where the rub is for
16 me, because I think -- as I read the spirit of the
17 fairness cases, it's not that easy for the Court to,
18 simply on a facial level, say that something is
19 clearly fair; right? By fair, we don't mean if the
20 range of something was 19 to 32. If you got \$19.10, I
21 don't think, if you read Weinberger, you could simply
22 say that's fair; right?

23 MR. ALLINGHAM: Sorry.

24 THE COURT: Well, could you? if you

1 just simply knew there were some raw fairness range
2 and it was \$19 to 31 and the committee got 19.10.

3 MR. ALLINGHAM: I think --

4 THE COURT: Is that what Weinberger
5 says is fair?

6 MR. ALLINGHAM: I think there are
7 circumstances in which I would argue that Weinberger
8 would permit a finding of fairness in that
9 circumstance. I think it's fact specific to the
10 particular deal.

11 THE COURT: Right. But that's what
12 I'm saying, which is I think it's one of these
13 situations where you could easily come out in a case
14 where you say "If I had to do an appraisal, I would
15 say this is 31.50. They got 29.75. It's an entire
16 fairness case. 29.75 is entirely fair."

17 But it's this process and price test.
18 If you look into effect -- and, frankly, the 29.75 was
19 validated by the market because it was informed by a
20 majority-of-the-minority vote. There had been
21 negotiations. There were dynamics this way, and
22 you're just one court trying to guess, you'd say
23 that's fair.

24 But I think there can be a

1 circumstance where somebody said "Look, it's within
2 the range of fairness." You didn't see any evidence
3 of negotiation. There was no negotiation of the
4 majority-of-the-minority vote. Might have been in
5 some bare range of fairness. But is that really what
6 an arm's length deal, right -- because part of what
7 you're trying to do is, how would an arm's length
8 negotiation come out; right?

9 MR. ALLINGHAM: Yes.

10 THE COURT: That doesn't mean it
11 necessarily comes out at the bottom of a fairness
12 range.

13 MR. ALLINGHAM: It's true it does not
14 necessarily mean that.

15 THE COURT: Right. I mean, a market
16 test would not necessarily suggest that it comes out
17 that the winner of the negotiation always -- you know,
18 that the winner is always the buyer who paid at the
19 low end of the valuation range. And what I'm saying
20 is complex. When I get -- you're -- you're really
21 saying if they had a financial advisor who came in and
22 said that this deal was mispriced, they would meet
23 their burden under Rule 56.

24 MR. ALLINGHAM: Uh-huh.

1 THE COURT: But by pointing to -- and
2 I admit they point to some of their complaint; but
3 they also point to things in the record, you know, the
4 stuff about the projections or the performance. That
5 stuff's in the record; right?

6 MR. ALLINGHAM: The -- the projections
7 are in the record, correct.

8 THE COURT: How about the stuff about
9 the performance of the company afterwards? Isn't that
10 in the record?

11 MR. ALLINGHAM: It's in the record.
12 It's in the first quarter 10-Q. It is, however -- let
13 me take that as an example, Your Honor, of the
14 difficulty with the discovery evidence that was
15 developed by the plaintiffs.

16 So there was -- there was extensive
17 discovery before the preliminary injunction hearing.
18 We moved heaven and earth to do what we had to do to
19 make the production, barrelling toward a PI hearing,
20 which days before the hearing plaintiffs abandoned.
21 Six months went by. The plaintiffs filed a document
22 request. We filed a motion for summary judgment. The
23 plaintiffs demanded extensive discovery. One of the
24 things that they asked for -- and -- and we

1 essentially agreed to give them all that discovery
2 with a single exception. I said, "Look, Mr. Perelman
3 has no knowledge about the issues presented on the
4 summary judgment." And they said -- they made no
5 objection to that. We gave them everything else. We
6 gave them the Perelman deposition.

7 THE COURT: Did that ultimately ever
8 happen?

9 MR. ALLINGHAM: Did what happen?

10 THE COURT: Did everybody enjoy their
11 turkey in France or -- you know, just as a human, I
12 bled for the --

13 MR. ALLINGHAM: Different case, Your
14 Honor.

15 THE COURT: Oh, that's a different
16 case, okay.

17 MR. ALLINGHAM: So one of the
18 issues --

19 THE COURT: They all bleed together.

20 MR. ALLINGHAM: One of the issues that
21 the plaintiffs specifically asked about was the new
22 set of projections. And -- and I think it's
23 conceivable they asked about it because they knew that
24 the new -- new company had new businesses in it, among

1 other things. And so you can't just take those
2 projections at face value. You have to look at
3 what -- what goes into it. And they said, "We want to
4 depose someone who can tell us about these
5 projections." That sounds like a good idea to me. We
6 said, "We can't object to that." So we produced a
7 fellow named Pete Fera, and we all trooped down to San
8 Antonio right after Labor Day. And the plaintiffs
9 took the deposition of Mr. Fera. And the plaintiffs
10 asked not a single question about the new projections,
11 not one.

12 Now, this is all of a piece, Your
13 Honor -- and I said this in our brief --

14 THE COURT: By "the new projections"
15 you mean the one -- the ones that were developed for
16 use by the committee or --

17 MR. ALLINGHAM: No, no. This is a new
18 set of projections in --

19 THE COURT: The subsequent year.

20 MR. ALLINGHAM: Yes, the
21 subsequent-year projections, okay, which were
22 responsive to the -- to the first-quarter results that
23 were better than had previously been projected, partly
24 as a result of acquisitions.

1 So that curious decision not to ask a
2 single question about a fact that they were going to
3 then present to Your Honor just as a bald fact is --
4 is all of a piece with what appears to be the
5 discovery strategy in this case.

6 THE COURT: Because they thought it
7 would be attractive to you.

8 MR. ALLINGHAM: So -- so all the piece
9 was a strategy in this case, what seems to be, anyway.
10 So they deposed all of the special committee members,
11 and they develop facts that relate to -- that show
12 that the special committee members were not complete
13 strangers to Mr. Perelman. Not surprising. Clearly,
14 not, as a matter of law, a problem. But it's -- it's
15 some connection of some kind.

16 So, for example, Mr. Webb used to be
17 an equity partner with Mr. Perelman in a bunch of
18 enterprises that made a lot of money for both of them.
19 It's a fact. It means they're not strangers.

20 What they didn't do was to ask a
21 single question about the legal construct that matters
22 here, which is materiality. So I can -- I can say to
23 Your Honor in my brief, "I think Mr. Webb is a very
24 rich man. I think Mr. Webb is a person who was

1 standing alongside Gerald Ford and Ronald Perelman in
2 the construction of these banking enterprises" --

3 THE COURT: This is a different Gerald
4 Ford; right?

5 MR. ALLINGHAM: It's a different
6 Gerald Ford. "And I think" -- "Tom Allingham thinks
7 that this is really not" --

8 THE COURT: Because if you were
9 standing next to Gerald Ford now --

10 (Laughter)

11 THE COURT: I mean, he was --

12 MR. ALLINGHAM: A return --

13 THE COURT: -- a really decent guy.

14 MR. ALLINGHAM: A return of the
15 vertigo.

16 THE COURT: We lost him,
17 unfortunately. So we'd really be in a very different
18 realm.

19 MR. ALLINGHAM: But I, Tom Allingham,
20 might say "That's not a relationship that causes
21 Mr. Webb to be so beholden to Mr. Perelman, and he'll
22 abandon his fiduciary duties and just do whatever
23 Mr. Perelman wants."

24 THE COURT: No. And I was focused

1 more -- because I think the financial fairness issue
2 is a very difficult one and part of why, again, the
3 policy decision about which standard of review is a
4 very important one.

5 MR. ALLINGHAM: I -- I --

6 THE COURT: Because I think a
7 litigable -- again, as I read the spirit of entire
8 fairness review, you have to look at both the process
9 and price. You're not allowed to just look at one.
10 Obviously the price is usually the most ponent thing,
11 but you look at the process as well. That things that
12 go to the process or go to questions about it go to
13 value.

14 I mean, I -- for example, I think an
15 effective plaintiffs' lawyer, if you -- if you
16 actually at trial were able to pick apart the
17 financial analysis undergirding the deal, you wouldn't
18 necessarily need your own expert; right?

19 MR. ALLINGHAM: That's true, Your
20 Honor, but you would need some evidence to support
21 your picking apart. That is, it's not enough to
22 say --

23 THE COURT: Oh, I agree with that.

24 MR. ALLINGHAM: It's not enough for me

1 to say "Oh, I think that the terminal value multiple
2 is wrong. And although I'm not going to show you my
3 math, I think that if you change the terminal value
4 multiple to something I think is right," I, Tom
5 Allingham, then you get numbers that are, you know,
6 50 percent larger.

7 THE COURT: No. For example, what
8 they do with Evercore is say "If you look at the
9 component parts of the business if you're doing a DCF
10 and you're looking at the exit multiple, you got to
11 look at the" -- "the contributing factors as of the
12 time you're doing your," you know, "valuation." I
13 think they're talking about the terminal date.

14 MR. ALLINGHAM: Uh-huh.

15 THE COURT: And they're saying "Look,
16 the components of this are changing. They didn't give
17 appropriate weight to that changing. And if you use
18 just a moderately higher exit multiple, the fairness
19 range moves in a very significant way, which casts
20 doubt on the fairness of the deal."

21 MR. ALLINGHAM: Yes. So in -- if Your
22 Honor is offering that as an example --

23 THE COURT: Well, I think that is one
24 of the points that they make.

1 MR. ALLINGHAM: So that -- that's a
2 point. That point is supported by citation to the
3 complaint and to nothing -- to nothing else. The
4 calculations are not replicated anywhere. They are
5 just stated as an attorney's ipse dixit. You can
6 present --

7 THE COURT: What exactly is an
8 attorney's ipse dixit?

9 MR. ALLINGHAM: It is to say the
10 thing. So it's just to say the thing. I just say it;
11 right?

12 So -- so at -- that's fine on a motion
13 to dismiss. On a Rule 56 summary judgment motion,
14 we --

15 THE COURT: They don't even cite to
16 the Evercore report for the underlying data.

17 MR. ALLINGHAM: Just for the facts,
18 but they don't challenge Evercore's independence or
19 expertise.

20 THE COURT: No, no. I think what
21 they're -- what I'm saying is, is it true that you can
22 calculate from the evidence that they cite to? I
23 thought their point was when you look at the terminal
24 value year, that a much higher percentage of the

1 overall earning of the company was one of the
2 businesses. When you looked at the multiples for that
3 business, they were significantly higher than the
4 multiples used by Evercore. Evercore did not adjust
5 for the changes in contribution; and that if they had
6 simply moved the exit multiple by .5 percent, then the
7 fairness range would move. And they do that, I
8 thought, by citation to actual parts of the Evercore
9 report.

10 MR. ALLINGHAM: So let me -- let me --
11 let me respond to that.

12 It is true that an argument is made
13 that the terminal value multiple derived from
14 comparable companies based on their performance in
15 2012 is challenged by the plaintiffs. It is true that
16 the challenge that they make is to say "Okay. I
17 observe" -- I did, by the way, ask Gus Christensen of
18 Evercore about this, another example of a willful --
19 apparently willful decision not to ask any questions
20 that might have developed some evidence on the points
21 that they are going to advance as attorneys' ipse
22 dixit. Sorry for using it again. I didn't ask
23 Mr. Christensen about this.

24 But the argument is "Evercore did what

1 Evercore always does in a circumstance where there are
2 multiple businesses in a company. They say, 'I'm
3 going to identify comparable companies. I'm going to
4 extract trading multiples based on 2012 trading prices
5 for those comparable companies. I am going to apply
6 those business unit terminal' -- sorry; 'those
7 business unit trading multiples to each business unit
8 of MFW, and I'm going to derive a single terminal
9 value multiple for MFW for application in 2015 cash
10 flows by weighting those individual business unit
11 comparable company derived trading multiples as a
12 one' -- 'a global terminal value multiple,' okay?

13 THE COURT: Uh-huh.

14 MR. ALLINGHAM: Now, there are a lot
15 of ways you could do that. One way is the way that
16 Evercore did it, which is the way they always do it,
17 which is to weight it based on a thing that we know,
18 the 2012 EBITDA contributions of each individual
19 business unit. It is quite true that another way you
20 could do it is to weight it in 2013 or '14 or 2015.
21 And the plaintiffs say, "You should have done it based
22 on the not knowable about projected business unit
23 contributions in 2015 because you're trying to derive
24 a multiple for 2015 cash flows."

1 THE COURT: Well -- and I think what
2 they're saying there is that -- and this gets to
3 whether it's evidence. And this gets -- this gets at
4 whether the Rule 56 standard, which is not what I'm
5 ultimately persuaded of now, right. But if what
6 they're saying is in 2015 you're doing a DCF on your
7 terminal value based on cash flows of that terminal
8 year. You've weighted them, which is by virtue of the
9 accepting the projections, you have, in fact, made a
10 decision about what percentage contribution would be
11 made by each of the businesses.

12 MR. ALLINGHAM: I don't know --

13 THE COURT: So why aren't you aligning
14 your judgment as to the projections, or is this some
15 sort of hedge?

16 And I guess where I'm down into the
17 weeds about this stuff is, I get your point if they
18 were just citing to their complaint. What I'm a
19 little confused about -- and believe me, I'm no, you
20 know -- I can -- the judges of this Court are more
21 willing victims of appraisals than, you know,
22 enthusiastic participants in them. I mean, it's some
23 sort of exercise of, like, the judicial -- because the
24 lull -- nobody wants -- no one is better able to

1 appraise a company than a law-trained judge faced with
2 two experts who are entirely divorced from any
3 academic or, you know, kind of principle who come in
4 and apply the same accepted methodologies and come out
5 an 80 percent value difference.

6 So I -- I don't really hunger to get
7 into this stuff. But what I'm trying to get at is
8 your friends have that point, which you say is a
9 debatable point; right? I get that. That's the
10 question, is in entire fairness --

11 MR. ALLINGHAM: Before we leave that
12 point, Your Honor, let me just say the real question,
13 I think, on that point is not whether you should pick
14 this alternative approach or that alternative
15 approach. It's, in the context of an overall
16 valuation, which is the only valuation in the record,
17 is that a reasonable -- reasonable approach to take?
18 And -- and --

19 THE COURT: But, see, that's where it
20 also bleeds into the role of the financial advisor as
21 not simply giving a fairness opinion but also as a
22 negotiator and whether they should have been using
23 these things to push back. And don't they also make
24 the point -- was it -- this was a comparable companies

1 analysis?

2 MR. ALLINGHAM: There is a comparable
3 companies analysis, yes.

4 THE COURT: Was there a comparable
5 transactions analysis?

6 MR. ALLINGHAM: Yes.

7 THE COURT: Okay.

8 MR. ALLINGHAM: And in both of those
9 cases they're just flat wrong. This is not even a
10 debatable point. In the comparable companies analysis
11 they just arbitrarily say, announce that in a
12 comparable companies analysis you have to add control
13 premiums to the comparable companies, okay?

14 Now, there are circumstances in which
15 you do add control premiums to a comparable company
16 analysis. Those circumstances do not -- this is just
17 Tom Allingham talking, which is just as good as Carl
18 Stine talking -- but do not include controller
19 transactions where control has already passed. So
20 that the remaining minority stockholders hold exactly
21 the same kind of economic interest as a single -- a
22 single stockholder trading on the Exchange.

23 THE COURT: Well, that's an
24 interesting question, because that's not actually a

1 purely financial question. It's one in which legal
2 policy itself actually plays as much a role as any
3 anything else. I mean, you know, you get into all
4 these debates about -- I don't think that there's,
5 really, any evidence that solvent companies -- and I
6 use the term "solvent." I mean, healthy, profitable
7 companies, that it can actually test the market, sell
8 at a premium as an entire company typically to
9 minority trades in their stock, which I don't really
10 understand and I don't know why some law professors
11 get confused by it. It presents no corporate finance
12 problem at all, because buying an entire company is
13 very different than buying a thousand shares. You're
14 getting something very different. It has additional
15 risks, but it has additional benefits. But you're not
16 buying the same thing.

17 What you're saying, the problem with
18 saying in a situation where there's a controller, that
19 obviously you know there's control. And so when
20 you're assessing what a fair price should be, you
21 should accept your fate that you bought a stock in the
22 controlled enterprise. The problem with that is the
23 intersection of appraisal value and our law; right?

24 MR. ALLINGHAM: I agree with that.

1 THE COURT: Right. What you would be
2 implying there is actually the standard of fair value
3 is different than the standard that would apply in
4 appraisal.

5 MR. ALLINGHAM: What I'm really
6 saying, Your Honor, is that --

7 THE COURT: Well, right, because in an
8 appraisal, you would have to make sure that there's
9 not a minority discount.

10 MR. ALLINGHAM: That's correct.
11 That's our law. I understand that.

12 But -- but what we have here is an
13 announcement by an attorney citing to his complaint
14 that, in a controller transaction, even in a
15 controller transaction, we have to add a control
16 premium to the comparable companies analysis prepared
17 by Evercore. Now, Evercore clearly didn't think so.

18 THE COURT: Oh, no, no. I get that.
19 And that's why I asked -- there's a different
20 comparable transactions analysis; right?

21 MR. ALLINGHAM: Yes. And I can speak
22 to that in a minute, but just --

23 THE COURT: Well -- and that would be
24 an analysis that would presumably take into account

1 the value at which entire companies were purchased in
2 the marketplace and, therefore --

3 MR. ALLINGHAM: It --

4 THE COURT: -- for someone looking for
5 an appraisal-type value, if you're talking about
6 adjusting out minority discounts, that analysis would
7 address that.

8 MR. ALLINGHAM: It might or it might
9 not, Your Honor. I can imagine -- and, remember,
10 you've got to place this particular transaction on a
11 spectrum of control transactions. So the plaintiffs
12 point out that this transaction is placed at the low
13 end of the spectrum of those control -- of those
14 comparable transactions. They didn't ask
15 Mr. Christensen why he placed this transaction there.

16 I would suggest to Your Honor -- and,
17 again, it's just as good as Mr. Stine or
18 Mr. Monteverde's opinion. I would suggest to Your
19 Honor that in that universe of whatever it was, 50 or
20 80 transactions, there was not a single controller
21 transaction in there. So it might be that you would
22 say -- but we don't know because they didn't ask
23 Mr. Christensen. And it's their burden to develop
24 this record.

1 THE COURT: Isn't this notion of a
2 controller transaction inconsistent with the test of
3 fairness itself?

4 MR. ALLINGHAM: I'm not sure I
5 understand, Your Honor.

6 THE COURT: If the idea under entire
7 fairness is that an asset will pass at essentially the
8 same price as it was the product of arm's length
9 bargaining --

10 MR. ALLINGHAM: Uh-huh.

11 THE COURT: -- isn't that inconsistent
12 with a controller overlay?

13 MR. ALLINGHAM: I don't think so, but
14 I think we're now talking about intersections of law
15 and corporate finance.

16 THE COURT: Oh, no, no. I get that.
17 But that's important, because the problem is when you
18 talk about -- like, when we do an appraisal, we don't
19 appraise the value of a company in some Brealey and
20 Myers way. We appraise the company in a
21 jurisprudentially defined way that our Supreme Court
22 has defined. That's why, when I do appraisals, it
23 makes my head hurt because I'm supposed to, A, adjust
24 for the -- make sure there's no minority discount but

1 then value the company as a going concern, which means
2 you've got to adjust away for any minority discount,
3 but then have to try to identify if there's something
4 -- synergistic value in the marketplace when people
5 buy and sell companies, and you have to take that out.

6 MR. ALLINGHAM: I --

7 THE COURT: People in the real world
8 don't have to, you know, do that. But in the world of
9 262, we do.

10 MR. ALLINGHAM: But let me circle back
11 to the -- I think the -- the fundamental question Your
12 Honor is asking.

13 So we could go to trial and we could
14 examine the question of fair price and fair process at
15 trial. We could do that. I take Your Honor's point
16 -- and I agree with it -- that we have this process
17 here. These two procedural protections would be
18 powerful evidence of fairness. I take that point,
19 too.

20 What I'm saying is -- is a little bit
21 different. What I'm saying is that there can be no
22 question that the burden has shifted to the plaintiffs
23 to prove unfairness in this case. I say that because
24 we have an uncontested majority-of-the-minority vote

1 here, and Southern Peru --

2 THE COURT: But the burden is to prove
3 it, but it's not -- it's to introduce now, to point to
4 admissible evidence that, you know, taken in its
5 entirety and construed -- has to be construed,
6 obviously, in a -- I guess there are all kinds of
7 philosophical debates about rational or reasonable
8 that I don't want to -- with my head cold, I can't
9 even begin to approach; but either -- at least let's
10 say it has to be a rational reading of that evidence
11 that the plaintiffs have pointed to, if accepted,
12 would persuade the tribunal that the deal was unfair;
13 right?

14 MR. ALLINGHAM: Yes.

15 THE COURT: And I think what your
16 friends say is too low terminal multiple, when -- just
17 looking a consistent analysis of what Evercore
18 accepted, which is the relative case with cash flows
19 of the businesses as of the terminal value, if you
20 just adjust for that and they all point to the
21 specific evidence, it would suggest that the deal was
22 unfair. Even excluding the new businesses that were
23 purchased by -- is it the check business?

24 MR. ALLINGHAM: Yes.

1 THE COURT: Yeah. That even --

2 MR. ALLINGHAM: I'm sorry, no. It's a
3 call center business.

4 THE COURT: The call center business.
5 Even if you exclude those, within six months there's
6 substantially overperformance, casting doubt on the
7 conservatism of the original projections. Then they
8 would put into the account, again -- they would say
9 "Look at this stress test on impairment, which
10 suggests a much more robust valuation of the same
11 assets. And, Judge, you might not believe us after
12 trial; but we at least get to go to trial and get our
13 shot at convincing you that this is unfair."

14 MR. ALLINGHAM: And my response -- and
15 I won't beat a dead horse, Your Honor -- is Rule 56
16 contemplates that, particularly in a situation where
17 the plaintiffs bear the burden. They can go and take
18 additional discovery. They can make their showing by
19 affidavit. They have to make their showing by
20 evidence. We have a situation here where there was
21 comprehensive discovery. Everything they asked for
22 they got.

23 What they have now presented to Your
24 Honor -- let me just talk about -- because remember

1 the scintilla of evidence issue on summary judgment.
2 It doesn't take just a scintilla. You can't just say
3 "Well, I got one," right? Or "I got two." It has to
4 be substantial evidence that would support the thing
5 on which they bear the burden.

6 So what we have is a comprehensive
7 valuation analysis from Evercore Partners, whom they
8 have not even bothered to challenge the independence
9 or expertise of. Okay, so there's no question here
10 that -- that Evercore was, you know, hiding the ball.

11 THE COURT: They deposed Evercore?

12 MR. ALLINGHAM: They deposed Evercore.
13 And it's important that in deposing Evercore, they
14 didn't ask Gus Christensen about any of the points
15 that they now make. And -- and with respect to the
16 overperformance question, they didn't ask Mr. Fera
17 down in San Antonio any questions about this point.
18 It's as if -- and -- and with respect to the
19 independence of the directors. They didn't ask any
20 questions about the materiality of it. It's as if
21 they thought to themselves, thinking about the
22 pleading-stage type motion, "If I don't ask these
23 questions, I won't get a bad answer. If I don't ask
24 these questions, I won't get a bad answer."

1 So they didn't ask the questions. And
2 so what you now have is, with respect to the terminal
3 value multiple, they have an argument that someone, an
4 unspecified someone, might make a different judgment
5 on this relatively small point than Evercore did.
6 They didn't ask Gus Christensen why he made that
7 judgment. So that's Point No. 1.

8 Point No. 2, what is the result of the
9 change -- the proposed change in that terminal value
10 multiple? Or said differently -- let's make it two
11 stages, Your Honor. They say that causes half-a-turn
12 increase in terminal value multiple. How do I know
13 that? It's just in their -- they just cite to their
14 complaint.

15 THE COURT: You can't figure it out
16 from the --

17 MR. ALLINGHAM: I can't figure it out.
18 In fact, I will tell, Your Honor, when I make the
19 calculation that I think they're trying to make, I
20 come out with a lower turn, not lower than Evercore's,
21 but lower than they've suggested. I can't replicate
22 it. And that illustrates the point.

23 How do we know? There's no -- there's
24 no evidence that's what happens if you do that.

1 There's no evidence that it is better to make the
2 judgment that they propose than Mr. Christensen's
3 judgment. They didn't ask Mr. Christensen why he made
4 that judgment.

5 And fundamentally, Your Honor, let's
6 just accept the half-a-turn increase. There's no
7 evidence in the record to suggest the massive
8 increases in value that they say flows from that. And
9 it's not my job --

10 THE COURT: It doesn't flow from math?

11 MR. ALLINGHAM: A, it's not my job
12 to -- to do terminal value calculations. And I don't
13 have a spreadsheet --

14 THE COURT: I know, but you --

15 MR. ALLINGHAM: -- and my computer
16 doesn't do it.

17 THE COURT: But we all know that you
18 love it.

19 (Laughter)

20 MR. ALLINGHAM: But, two, we have a
21 construct here. Rule 56 requires evidence. No one
22 can tell.

23 THE COURT: Okay. If I can do the
24 math, if Strine can do the math, is that in the

1 record? I mean, it's -- it's the movement from 5 to
2 5.5. I mean, it's a range; right? You never did
3 the -- what you're saying, they needed to do the
4 actual math?

5 MR. ALLINGHAM: It is their burden,
6 and they need to put in the evidence of math. It
7 could be "I have expertise in this area. I've done
8 the calculations, and the result is this." It cannot
9 be "Here's my brief."

10 THE COURT: Do they cite the analysis
11 of Evercore, though?

12 MR. ALLINGHAM: Not for this -- not
13 for the impact on the price. They cite -- it's on
14 page 29 of their brief. They cite complaint Nos. --
15 paragraph 79 and complaint paragraph 80 on the way
16 Evercore calculated its terminal value. They do cite
17 Evercore. But for the conclusions they draw on which
18 they rely for the notion that there is a disputed
19 issue of fact on fairness, they cite to their
20 complaint, and that's it.

21 And, Your Honor, plaintiffs put in
22 expert affidavits all the time. They're capable of
23 doing that. You know, there's the old principle in
24 Van Gorkum that we get evidence -- where strong

1 evidence is available, ought to be -- you ought to
2 derive inferences from that. They know how to do
3 this. This is their burden.

4 With -- with respect -- and so what we
5 have is this unsupported calculation on a terminal
6 value multiple turn of half a turn and an unsupported
7 calculation about its value impact. You have
8 projection -- and -- and, again, they didn't develop
9 the evidence that they could have developed when they
10 had the opportunity to. On the overperformance, they
11 didn't ask a question of Mr. Fera about that. These
12 are -- these are issues on which they bear the burden
13 and where they affirmatively made a decision not to
14 ask.

15 THE COURT: Do you have anything
16 further at this time, Mr. Allingham?

17 MR. ALLINGHAM: May I have a minute,
18 Your Honor?

19 THE COURT: Sure.

20 MR. ALLINGHAM: We've -- we've strayed
21 from my prepared script.

22 THE COURT: That's surprising to you,
23 I know.

24 MR. ALLINGHAM: If I might take a

1 minute, Your Honor, to talk about the -- the one
2 arguable point that the plaintiffs -- you know what?
3 I'll wait.

4 I think, Your Honor, that I'll
5 reserve --

6 THE COURT: Okay.

7 MR. ALLINGHAM: -- for rebuttal.

8 THE COURT: Thank you, Mr. Allingham.

9 We should probably hear from the
10 special committee, and then you can ...

11 MR. MUNDIYA: Thank you. Good
12 morning, Your Honor.

13 THE COURT: Good morning.

14 MR. MUNDIYA: I'll be -- I'll
15 reasonably brief.

16 There is no genuine issue here that
17 the special committee acted -- it was independent,
18 acted thoroughly, understood its mandate, and did the
19 job that was expected of it throughout the summer of
20 2000 --

21 THE COURT: How many meetings did the
22 special committee have?

23 MR. MUNDIYA: Eight meetings from June
24 through September, Your Honor.

1 No question that there are independent
2 legal --

3 THE COURT: They're all in the
4 Hamptons?

5 MR. MUNDIYA: No, Your Honor. They
6 were -- they were various places, but they met in
7 person and over the phone.

8 THE COURT: Went from Ina Garten's
9 place to Billy Joel's place to a trashy weekend outing
10 with some fallen former Disney teen idol.

11 MR. MUNDIYA: They --

12 THE COURT: A full summer in the
13 Hamptons.

14 MR. MUNDIYA: There was extensive
15 discussion, Your Honor, over this -- this deal. They
16 understood -- they understood their mandate,
17 independent legal advisors, independent financial
18 advisors.

19 THE COURT: What about these
20 connections with law firms? I mean, the Bancroft
21 firm, what exactly -- what work had they done for the
22 Perelman-controlled entity?

23 MR. MUNDIYA: There was some discrete
24 work that the Bancroft law firm did. There was no

1 specific engagement letter, and the amount of fees was
2 \$50,000. So de minimis in 2010, 2011. There was
3 \$150,000 that was charged by Bancroft for Scientific
4 Games, which is a Perelman affiliate. Again, discrete
5 work, de minimis. The record is clear it was de
6 minimis. So -- and it was also discussed at the
7 special committee. So --

8 THE COURT: What year was that?

9 MR. MUNDIYA: That was 2010, 2011.
10 2010 --

11 THE COURT: So a couple hundred
12 thousand fees for the 2010 --

13 MR. MUNDIYA: Yes. Maybe even going
14 back to 2009 as well, Your Honor. So it was de
15 minimis.

16 With respect to Ms. Byorum, similarly,
17 2007, 2008. They did some investment banking work
18 for --

19 THE COURT: Is it really wise for
20 independent directors to be service providers?

21 MR. MUNDIYA: Your Honor, it -- it
22 is -- it's not wise as a -- as a policy matter; but
23 Mr. Dinh is a -- is a partner in a law firm. It
24 was -- he has special expertise in some of these

1 matters. It was discrete advice. It wasn't ongoing
2 -- certainly wasn't ongoing at the time of the deal.

3 THE COURT: Was he personally working
4 on these matters?

5 MR. MUNDIYA: I think he was
6 supervising the matters. I think the work was done --
7 was work done by associates.

8 THE COURT: He was the billing
9 partner?

10 MR. MUNDIYA: Yes, Your Honor. Yes,
11 Your Honor. He was -- he was involved.

12 Let -- let --

13 THE COURT: Was he ever asked about
14 his total billings for the firm?

15 MR. MUNDIYA: I think he was -- he
16 was -- he was asked about the billings generally. And
17 I think he said -- he gave -- he gave the number,
18 50,000 to a hundred thousand.

19 THE COURT: No. His billings.

20 MR. MUNDIYA: I don't think he was
21 asked that question, Your Honor.

22 THE COURT: He wasn't asked?

23 MR. MUNDIYA: He was asked about the
24 -- the amount of work that Bancroft had done.

1 THE COURT: Oh, no. I understand.
2 But he wasn't asked personally about, like, you know
3 --

4 MR. MUNDIYA: "How many hours did you
5 spend on this project?"

6 THE COURT: No.

7 MR. MUNDIYA: Sorry.

8 THE COURT: What his denominator was.

9 MR. MUNDIYA: No, he was not asked
10 that question, but he did testify it was de minimis.
11 The denominator was not --

12 THE COURT: Yeah, but you know your
13 denominator; right?

14 MR. MUNDIYA: Yes, yes, we do.

15 THE COURT: Or a pretty close range of
16 it; right?

17 MR. MUNDIYA: No. That's right, Your
18 Honor. But that -- that was -- again --

19 THE COURT: That's what I'm saying.
20 They chose not --

21 MR. MUNDIYA: They chose -- that's the
22 point. You know, they chose not to ask that question.

23 But the -- but the testimony is -- the
24 testimony is that the amount of fees that were charged

1 were, quote, de minimis, both with respect to
2 Ms. Byorum and with respect to Bancroft.

3 And if you go back to the summer of --

4 THE COURT: Yeah. I just observe I
5 think as a matter of, like, when people say things are
6 de minimis, I'm not saying they're not de minimis. If
7 things are immaterial and de minimis -- you know,
8 here's good advice for the world -- stop doing them.

9 MR. MUNDIYA: Okay.

10 THE COURT: Because then the cost of
11 legal briefs to argue about them exceed them, but they
12 create question -- I mean, I really -- the question
13 is -- I know the Exchanges have much tighter
14 definitions; but why people would be service
15 providers, you're kind of in one bucket or they're --
16 you know, we're in a new rung. You're either a
17 service provider or you're the other. And that's
18 where you know you're going to get people -- I'm not
19 saying that's the law, but people come in all the time
20 and say "I did something that was de minimis and
21 immaterial."

22 MR. MUNDIYA: Right.

23 THE COURT: Which makes them sound
24 frivolous, which is you think that they're, you know,

1 again, happy-go-lucky because that day they just
2 happened to do de minimis, immaterial things.

3 MR. MUNDIYA: Your Honor, understood.
4 And -- and these -- these did go back in time, and it
5 was -- it was discussed --

6 THE COURT: Yeah, it wasn't that much
7 time, 2009 -- this transaction was consummated in ...

8 MR. MUNDIYA: 2011, Your Honor.

9 THE COURT: Okay.

10 MR. MUNDIYA: When -- when we go back
11 to what the special committee did, the -- the one
12 thing that I think stands out is the amount of work
13 that did go into understanding the transaction, the
14 fact that alternatives were looked at over the summer
15 of 2011.

16 I don't know whether Your Honor's had
17 a chance to look at the -- the August 10th and
18 August 17th presentations by Evercore, but that tells
19 you how thorough Mr. Meister, Mr. Dinh and Ms. Byorum
20 and Mr. Webb looked at this transaction. They asked
21 Evercore to look at a potential sale of Harland Clarke
22 to a competitor, even though that may not have been
23 feasible; but they said, "Let's check to see that the
24 deal on the table is the best that we can get for the

1 shareholders."

2 So they went out and they looked at a
3 deal, a potential transaction, that may not have been
4 viable as a practical matter, but, as an economic
5 matter, to see if that was the best deal available for
6 shareholders. And Evercore concluded that it was not.

7 THE COURT: The practical obstacles
8 were Mr. Perelman's objection -- would have been his
9 objection to selling --

10 MR. MUNDIYA: No, Your Honor.

11 THE COURT: -- or the antitrust
12 concern about --

13 MR. MUNDIYA: That's right.

14 THE COURT: -- having only one big
15 check-writing, check-printing gorilla --

16 MR. MUNDIYA: That's right, Your
17 Honor. The antitrust concerns --

18 THE COURT: -- in a dead market.

19 MR. MUNDIYA: Right.

20 So when we go back -- when we go to
21 the specifics of -- of the special committee members,
22 you see Mr. Meister. He is -- there's no challenge to
23 his independence. He's been a director of this
24 company since 1995. He understood the business

1 extremely well; public company experience, private
2 company experience, you know, understood his mandate,
3 was very involved in the -- in the discussions with
4 Evercore and led the charge. So he was a
5 quintessential special committee member.

6 We have Ms. Byorum, who had great
7 investment banking experience. Any work that she'd
8 done ended four years prior to this transaction for
9 Scientific Games.

10 The only other issue they have on
11 the -- on the independence are the, quote, clubby Wall
12 Street entanglements. Doesn't -- doesn't amount to
13 anything, Your Honor.

14 THE COURT: They're just expected.

15 MR. MUNDIYA: Well, it's historical.
16 And the fact that she was at Citibank from 1996 to
17 2007 --

18 THE COURT: No. I understand.

19 MR. MUNDIYA: -- is really --

20 THE COURT: I mean, that's -- what
21 you're talking about, that's the old structural bias
22 argument; right?

23 MR. MUNDIYA: Right. There was no
24 business with Ron Perelman entities between 1996 and

1 2007. So I think -- I think that should -- that
2 disposes of that.

3 And with respect to Mr. Webb, you
4 know, no -- no relationship with Mr. Perelman for 10
5 years. They're not -- the evidence is there's no
6 social relationship. They're not friends. They meet
7 at board meetings.

8 THE COURT: I take it Mr. Webb is
9 pretty wealthy.

10 MR. MUNDIYA: He is pretty wealth,
11 Your Honor.

12 So with that, we don't think there's
13 really any genuine challenge to the independence of
14 the committee.

15 THE COURT: Thanks.

16 MR. MUNDIYA: For those reasons, the
17 Court should grant summary judgment.

18 THE COURT: Thank you.

19 MR. STINE: Good morning, Your Honor.

20 I think we have to take a step back
21 here and take a look at what motion the defendants
22 made. Defendants did not make a motion saying that
23 the burden should shift to entire fairness. They
24 didn't make that motion. They also did not make a

1 motion saying that the evidence shows that we meet our
2 burden of entire fairness here. The motion that they
3 actually made, which is not really what they argue
4 today, the motion that they made was the standard of
5 review should be under Cox/CNX and not under Kahn
6 versus Lynch and that business judgment should apply
7 and, under business judgment, they win.

8 So we got this motion. We got
9 discovery on that motion. We got discovery on that
10 motion. And then defendants filed a reply. And the
11 reply all of a sudden says, out of nowhere, we don't
12 meet our burden -- "Plaintiffs don't meet [our] burden
13 of entire fairness." Well, that wasn't the motion
14 they made. Certainly, had they made that motion, we
15 would have come to Your Honor and said, "Your Honor,
16 we would like to complete discovery. We would like to
17 complete expert discovery. We would like to put in
18 expert reports." At that point we think it's
19 reasonable, then, to talk about a summary judgment
20 motion on entire fairness or shifting the burden.
21 Or -- and in the reply they don't withdraw their --
22 they don't withdraw their motion and file a new
23 motion. They don't seek to amend their motion. They
24 just file a reply.

1 First of all, it's outside -- way
2 outside of the scope of the original motion and,
3 therefore, the reply is improper. And the whole
4 discussion of whether or not plaintiffs meet their
5 burden of showing entire fairness is really not
6 proper, given the scope of the initial motion, the --
7 not the initial motion; the motion that is here before
8 Your Honor.

9 Second of all, in Southern Copper --

10 THE COURT: So you're saying they do
11 not argue in the alternative --

12 MR. STINE: They do not.

13 THE COURT: -- in the opening brief.

14 MR. STINE: They do not. They don't
15 argue in the alternative. They don't even mention
16 entire fairness. They don't say, "Your Honor, if you
17 should choose to apply Kahn versus Lynch, it's
18 plaintiffs' burden to show fairness." They don't say
19 that. They don't say, "In the alternative, Your
20 Honor, if" -- "if Your Honor wants to follow Kahn
21 versus Lynch, we want to make a motion to shift the
22 burden." They don't --

23 THE COURT: You're saying they do that
24 in their reply brief.

1 MR. STINE: It's all in their reply
2 brief. It's not in their opening brief.

3 The discovery that we did based on the
4 motion that they made, they didn't seek to amend their
5 motion. They didn't withdraw their motion and file a
6 new one. So we're here today -- and there has been
7 literally an hour discussion -- about entire fairness
8 and plaintiffs' supposed burden of coming with
9 evidence --

10 THE COURT: So you view the motion as
11 presenting a purely legal question.

12 MR. STINE: Well, in a sense.

13 THE COURT: Or in a doctrinal, which
14 is you either -- once you're in business judgment rule
15 land, then you're in the
16 if-a-rational-person-could-approve-it-as-fair.

17 MR. STINE: Exactly right. So -- so,
18 Your Honor, the -- the question isn't, you know,
19 whether or not we have an expert affidavit to show
20 that -- our view on the fairness of the price. We'll
21 get to that. You know, we haven't gotten to that
22 point yet. We get to that after -- when we get to
23 expert discovery. We haven't gotten to expert
24 discovery. It wasn't an issue in their opening brief,

1 in their motion -- I keep saying "opening," but it's
2 not an issue in their motion. They didn't make that
3 motion.

4 THE COURT: Well, the motion was just
5 a form motion; right?

6 MR. STINE: Oh, no, no, no, no. It
7 wasn't, Your Honor. It was a brief. They filed a
8 brief in support of. It was not a --

9 THE COURT: Oh, no, no, no. What I
10 mean is the motion itself, right, is -- they filed
11 their opening brief the same day as their motion.
12 Therefore, what explains the basis for seeking summary
13 judgment is the brief.

14 MR. STINE: Yes.

15 THE COURT: Right.

16 MR. STINE: That's true, Your Honor,
17 yes.

18 THE COURT: All right.

19 MR. STINE: The brief explains it.

20 And so -- and the second point is
21 they -- they -- defendants, you know, Mr. Allingham,
22 said that it's obviously our burden because they had a
23 special committee and a majority of the minority. So
24 in Southern Copper, Your Honor -- I'm sure Your Honor

1 knows this better than I do because it was --

2 THE COURT: Not necessarily.

3 MR. STINE: Not necessarily.

4 (Laughter)

5 THE COURT: In order to process
6 current developments, I think it's most -- it's
7 critical to me, I think -- and to many other people --
8 to eliminate previous --

9 MR. STINE: Right.

10 THE COURT: -- information.

11 MR. STINE: The brain wipe, yes. I
12 understand, Your Honor.

13 So in Southern Copper --

14 THE COURT: I mean, I'm happy when I
15 go back and read something that I wrote and say, "Wow,
16 I still agree with myself."

17 (Laughter)

18 THE COURT: But I -- I don't
19 necessarily have any recollection of having written
20 it.

21 MR. STINE: Right. With me, it's even
22 what I ate for dinner the night before.

23 THE COURT: Exactly.

24 MR. STINE: So -- but in Southern

1 Copper, the defendants moved for summary judgment,
2 saying that the burden should be shifted. So they did
3 that. And according to the Supreme Court decision,
4 Your Honor could decide whether to shift the burden
5 based on the -- on the pretrial record. And the
6 Supreme Court said, "In the absence of a renewed
7 request by the Defendants during trial that the burden
8 be shifted to the Plaintiff, the burden of proving
9 entire fairness remained with the Defendants
10 throughout the trial."

11 Here, they didn't make a motion.
12 There's been no judicial ruling. I think -- I think
13 it's pretty clear under Southern Copper that the
14 Supreme Court was saying that the burden stays with
15 defendant until a judge says otherwise, they make a
16 motion or there's some other --

17 THE COURT: So what you're saying is
18 you view this as teeing up the purely -- well, I mean,
19 not that it's purely legal, because there are elements
20 of their motion in terms of things like whether the
21 committee members were independent, whether the
22 committee's mandate was sufficient. You agree they
23 teed those up, issues, but solely for purposes of
24 saying -- they didn't get to the point of well, if

1 it's entire fairness lite -- for the students, that's
2 spelled l-i-t-e, just like lite beer. If it's entire
3 fairness lite, the plaintiffs haven't -- don't have,
4 you know, evidence of financial fairness.

5 MR. STINE: They didn't -- they didn't
6 argue that in their -- in their motion. That's not in
7 their motion. It's in their reply and --

8 THE COURT: So what you took yourself
9 as your charge to do was to just, one, say "No. The
10 law is" -- "under Lynch, Tremont, Emerald Partners,
11 and Southern Peru, the law is it's entire fairness no
12 matter whether you use both" --

13 MR. STINE: Right.

14 THE COURT: -- "and even if you were
15 going to be eligible, the committee" -- "the committee
16 was not sufficiently independent or empowered."

17 MR. STINE: That's exactly right, Your
18 Honor.

19 THE COURT: Okay.

20 MR. STINE: And that's what's in our
21 opposition. And it's -- so we didn't -- we didn't
22 respond to a motion that they didn't make. So that's
23 the first thing.

24 So, first of all, the burden hasn't

1 shifted because there hasn't been a judicial
2 determination that the burden hasn't shifted. That's
3 the first point.

4 But --

5 THE COURT: Okay. Can we then talk
6 about what you thought the motion was about? Because,
7 you know, I think Mr. Allingham admitted -- and, you
8 know, the special committee's lawyers would have to
9 admit -- that there are sentences that say when you
10 have a merger with a controlling stockholder, the
11 entire fairness standard applies.

12 MR. STINE: Right.

13 THE COURT: No question. You got -- I
14 mean, you can take that thing, and you say -- I
15 actually think it uses -- some of them use the H word.

16 How is it, though, that cases that
17 never addressed a question address the question?

18 MR. STINE: I'm sorry?

19 THE COURT: How is it that cases that
20 never addressed a specific question in fact address
21 that specific question?

22 MR. STINE: Well, Your Honor, I
23 think --

24 THE COURT: That sounds philosophical,

1 but it is. I mean, it's actually important.

2 MR. STINE: Right. No. And I
3 understand the question, Your Honor.

4 And I think I would answer it that --
5 that there's always a way to distinguish any case.
6 That's first of all.

7 And the second point is the Delaware
8 Supreme Court decides cases on the facts, but it also
9 provides guidance to all practitioners and to the
10 courts --

11 THE COURT: Well -- but no one is
12 bound -- I mean, we do have a system of hierarchy, and
13 I take it very seriously. That's why I'm asking these
14 points.

15 MR. STINE: Right.

16 THE COURT: You know, I've -- I think
17 I've discussed the -- some of these questions in three
18 or four cases over a 14-year judicial career --

19 MR. STINE: Right.

20 THE COURT: -- even though I have many
21 entire fairness cases. And I never have addressed the
22 specific question here directly because I never was
23 actually presented with the question. No one has ever
24 presented the question before.

1 And that's why -- I understand people
2 give guidance, but one of the problems with
3 guidance -- one of the problems with dictum is an
4 overbroad statement of what a holding is when it's, in
5 fact, not a holding, leaves people uncertain.

6 And as I said about the homework, I
7 think the homework analogy is apt. If you tell
8 people -- you tell your kid, "If you do your math or
9 your English homework Saturday, you get to go to the
10 movies on Saturday night." That means Sunday, when
11 you want to just have a martini or a cold milk and a
12 cookie and homework all to be done, you know your kid
13 is going to have taken the one homework assignment and
14 waited until Sunday night; right?

15 MR. STINE: Right.

16 THE COURT: Whereas if you say "You
17 only get to go to the movie if you do both on
18 Saturday" so that Sunday is relaxing, the kid has an
19 incentive to actually do both.

20 MR. STINE: Right. And that is why,
21 Your Honor, we just didn't stop in our analysis in our
22 brief with "Judge, you have to follow Kahn versus
23 Lynch because that's the law." We didn't stop at
24 that. What we did is we then moved on to the next

1 point and said "Judge, the law should remain as it is"
2 --

3 THE COURT: I get that, but what I'm
4 saying -- Mr. Stine, you would say both that the
5 cognitive tension that I would face as a trial judge
6 is that "I have flat-out statements from the Supreme
7 Court that say this is the standard of review."

8 MR. STINE: Right.

9 THE COURT: That's the strong point in
10 your favor. The strong point in Mr. Allingham's favor
11 is the precise question asked -- being asked of this
12 Court now has never been asked of my Supreme Court.

13 MR. STINE: Right.

14 THE COURT: And they've never had the
15 opportunity to answer; right?

16 MR. STINE: Right. Well, they haven't
17 had --

18 THE COURT: So doesn't it come down to
19 what the technical -- what it actually means to do a
20 holding?

21 MR. STINE: Right.

22 THE COURT: And can we say if the
23 definition of an actual holding in something that's
24 necessary to a decision, isn't the only holding that

1 was necessary in the prior decisions to say that using
2 one of these procedural devices will not invoke the
3 protections of the business judgment rule? As a
4 precise matter, the only thing that was necessary to
5 decide the case was to hold that using one of them is
6 not good enough?

7 MR. STINE: Right. And --

8 THE COURT: Is that correct?

9 MR. STINE: In response to that, what
10 I would say, Your Honor, is courts always decide
11 whether they want to interpret holdings of a higher
12 court narrowly or broadly.

13 THE COURT: Well -- and I don't want
14 to decide that. What I'm asking is if there's a
15 precise definition of what is dictum or not, if the
16 definition is is it necessary to decide the question
17 before the Court, that in all of those previous cases
18 it was -- it was totally sufficient to simply say that
19 the use of one of the devices would not alleviate the
20 ultimate burden to have an inquiry as to substantive
21 fairness; right?

22 MR. STINE: Right. Well, I think --

23 THE COURT: Is that correct?

24 MR. STINE: No. I think what Your

1 Honor is saying is it wasn't an issue at the time. So
2 you didn't -- so they didn't need to decide the issue.

3 THE COURT: As a result, as a formal
4 matter of whether something is binding precedent under
5 the classical definition, it would not be.

6 MR. STINE: Right. And -- and I agree
7 with that, Your Honor.

8 THE COURT: Okay.

9 MR. STINE: And I don't disagree with
10 that. I think we all --

11 THE COURT: No. And I want --

12 MR. STINE: In fact, I think the law
13 students would agree with that, too, that that's the
14 definition of "holding."

15 THE COURT: And I think one of the
16 issues is, then, because you have a statement, it can
17 affect corporate -- it can affect people's behavior
18 because they do have to read -- as you said, there's
19 a -- some of my colleagues or the previous colleagues
20 on the Court, you know, used to talk about the
21 difference between the -- you know, listening to the
22 entire musical piece rather than one note.

23 MR. STINE: Right.

24 THE COURT: Because even in Lynch,

1 wouldn't you agree, one of the issues in Lynch, for
2 example, about why it wasn't enough was that what you
3 were going to do is run and do a tender offer if the
4 committee said no? And a tender offer is a form of
5 acceptance; that my friend, Professor Bebchuk, for
6 example, would say a tender offer is intrinsically
7 more coercive than a merger vote because if you don't
8 tender, you could be left in even a worse situation
9 where you're, like, now a stub part of, like, having a
10 7 percent public float or something like that; right?

11 MR. STINE: Right, right.

12 THE COURT: Whereas in a merger vote,
13 you can vote freely and still get the deal closed.

14 MR. STINE: Right.

15 THE COURT: I appreciate that candor.

16 Why don't we talk about the why not,
17 because what -- I think it is -- it's an --
18 interesting and rational minds can differ about it.

19 The problem with the current dynamic,
20 obviously from your clients' own perspective, is if I
21 rule for your current clients, who I assume hold stock
22 in many other companies, why will they as stockholders
23 in any other companies ever have the benefit of these
24 procedural protections in combination?

1 MR. STINE: Well, I think that the
2 Delaware Supreme Court and in -- in Southern Copper
3 actually dealt with that, that it's a matter of good
4 corporate practice. But to back off of that --

5 THE COURT: So people should just do
6 good things selflessly --

7 MR. STINE: Well, no, it's not a
8 question --

9 THE COURT: -- and they'll see a wave
10 of -- I mean, policy -- part of why you have a go
11 toward things, like Unocal, which had to go towards
12 independent directors, right, Revlon -- is you set --
13 there are risks, right, with any kind of standard,
14 because for a standard to create the right incentive
15 effect, somebody has to get something for it. When
16 they get something for it, it's a cost because in a
17 particular case there could be a cost. But if what
18 you gain from the overall standard is systematically
19 valuable to the people you're trying to protect, then
20 you might do it.

21 MR. STINE: Right.

22 THE COURT: And isn't it fairly stark
23 that if you don't actually give credit to doing both,
24 rational controllers will not do both except as some

1 deal-closing metric with a settlement; right?

2 MR. STINE: Right. And my response to
3 that is I'm -- I'm not sure why they would do both,
4 but they might do -- first of all, there's two
5 responses.

6 First of all, if there's an actual
7 independent special committee negotiating and they
8 think that there's a benefit to the shareholders to
9 get a majority-of-the-minority provision, then they
10 will use that in negotiations, and maybe they will
11 decide a higher price in response to that.

12 But my real response to that is what
13 we wrote in our brief about majority-of-the-minority
14 provisions. And that's that in -- in the real world,
15 our -- our arbitrageurs come in and they buy shares,
16 and their interest is not in voting in -- in favor of
17 a deal or against a deal because it's fair or unfair.
18 They're looking for their 10 cents.

19 THE COURT: But isn't that -- but the
20 problem with that is -- I mean, you know -- and I
21 admit to my own -- I think that the smartest people in
22 the market often get the most disserved by our
23 corporate governance system. The smartest people in
24 the market are the people who index. That's the real

1 smart money. Smart money doesn't get represented in
2 our corporate governance system. Dumb money sets the
3 tone.

4 What do I mean by "dumb money"? is
5 every corporate finance class in the country teaches
6 that an active trading strategy is likely to result in
7 a poor outcome because you're trying to outguess the
8 entire market. You're unlikely to do that, and you're
9 likely to run up really high costs and particularly if
10 you're not taking any nondiversifiable risk. I mean,
11 private equity or someone like Mr. Perelman, arguably,
12 get compensated for taking nondiversifiable risk
13 because they actually buy particular companies and
14 have control to go with it. So I get all that.

15 But isn't there an issue -- and I
16 think Chancellor Chandler pointed this out in Airgas.
17 It was certainly pointed out across the pond when the
18 people who make dairy milk were sold. Who did the
19 arbitrageurs sell to? Who did they get their shares
20 from?

21 MR. STINE: They got them from regular
22 shareholders, yes, that's --

23 THE COURT: Regular shareholders who
24 presumably decided that the price in the marketplace

1 after MacAndrews & Forbes made its premium-to-market
2 offer was sufficiently attractive that they would
3 voluntarily sell their shares; right? So arbitrageurs
4 -- if the whole argument is arbitrageurs, all they
5 want is 10 cents more, it may be because people are
6 longer holders. Now, it may be a mutual fund and it
7 may have held it for 17 months. But, remember, in
8 this country you get a long-term capital gains rate
9 when you hold an asset for how long?

10 MR. STINE: A year.

11 THE COURT: A year; right? That's our
12 idea of the long term is, is a year. All the
13 arbitrageurs got their shares presumably from
14 longer-term holders who concluded that the price
15 increase that had already resulted from the offer was
16 sufficiently attractive for them to sell.

17 So I'm not sure it even -- to say,
18 then, the arbitrageurs only want X percent more, if
19 they could get X plus 25 percent more, wouldn't they
20 be happier?

21 MR. STINE: No, no. Absolutely. And
22 the response to that is I just -- I would say because
23 people are selling to arbs at that point doesn't
24 necessarily mean that they -- that's not necessarily a

1 referendum on the fairness of the transaction.

2 THE COURT: No. Of course there's
3 not. I mean, everybody has different horizons. For
4 example, if you've got an actively traded mutual fund
5 that has had some problems in its performance and
6 other sectors of the portfolio having a premium come
7 in, the ability to take a premium and another thing
8 might be a useful thing -- I mean; right? I mean,
9 everybody has different things. Somebody needs --
10 your kids' tuition is due.

11 MR. STINE: No, no. Absolutely.
12 And -- but I don't --

13 THE COURT: But that's not always --
14 that's not a company-specific factor. And if you want
15 to, sort of -- you'd have to prove that this is
16 somehow -- that the blend of sellers for this company
17 were different; right? Because that affects every
18 stockholder base.

19 MR. STINE: No. No.

20 THE COURT: Everybody has different
21 horizons.

22 MR. STINE: I don't think it's a
23 question of horizons. I think it's a question of
24 here's Ron Perelman; right? And the analysis -- they

1 announce a proposal by Ron Perelman for \$24. Time
2 goes by, and a lot of people sell and buy at \$24 at
3 that point. Time goes by, and they announce that a
4 deal is done, there's a merger agreement at 25. And a
5 significant, you know -- maybe they think -- maybe
6 it's based on horizon, but I doubt it. I think it's
7 based on the fact that "This is a done deal. I'm
8 going to take my \$25 now."

9 THE COURT: But isn't that, Mr. Stine,
10 what we're really, then, saying, that the stockholders
11 really shouldn't be even given rights?

12 MR. STINE: No.

13 THE COURT: No, no. What I mean by
14 that is they are essentially folks who have -- are
15 infants, not even adolescents or --

16 MR. STINE: Are what? I'm sorry. Are
17 what?

18 THE COURT: Life is full of risk.

19 MR. STINE: Right.

20 THE COURT: Every day you take a risk.
21 You cross the street. You do whatever.

22 MR. STINE: Right.

23 THE COURT: What we're saying as
24 stockholders, "Okay, it was a \$24 offer that was a

1 41 percent premium to market. We held through that.
2 We were hoping the special committee" -- "they get 25.
3 That's only a dollar more. Now it's what? --a 44,
4 45 percent premium. We think the long-term value is
5 higher, but let's just take the 25 now."

6 Their choice is obviously to vote no.

7 Here's another reason why they could
8 vote no. You're not talking about them having to wait
9 long to actually get the 25; right?

10 MR. STINE: You never know.

11 THE COURT: No, no. Wait a minute.
12 If they vote no and a majority of them vote no, then
13 they get to remain as investors in the company; and if
14 the company's prospects are better, which is what
15 they're supposedly -- that's why they think it's more
16 than 25 -- they're still in the same situation.
17 There's still a substantial public float. If they vote
18 no and a majority of the stockholders vote yes, the
19 only economic consequence to them of not having sold
20 before the vote is some three- or four-week time
21 period, because when the deal closes -- and most
22 people who buy companies like to close fairly rapidly;
23 right?

24 When did they close here?

1 MR. STINE: It was --

2 THE COURT: This particular --

3 MR. STINE: It closed --

4 THE COURT: -- like, really fast. I
5 mean, this one may never have won another lag in
6 history between, you know, closing, if you might
7 remember --

8 MR. STINE: Yes.

9 THE COURT: -- the Technicolor gap.

10 So really what you're talking about is
11 somebody holding out. They cast their no vote. If
12 their no vote doesn't succeed, they can take the deal
13 price when the deal closes with everybody else; right?
14 So they're really -- what they're risking there is the
15 difference between getting \$25 per share five weeks
16 before they would otherwise get it. And what we're
17 saying is that kind of value gap makes stockholders
18 unable to freely vote.

19 MR. STINE: I'm not saying that
20 they're not freely able to vote.

21 THE COURT: Wait a minute. That's --
22 you are kind of saying that; right? Is that the
23 courage to have the actual courage to stick out,
24 right, to get paid five weeks later, that stockholders

1 can't actually wait that long. If that is the case,
2 that it -- really fundamentally undermines giving them
3 the right to vote on anything.

4 MR. STINE: Well -- and in response to
5 that what I would say is: First of all, it's not a
6 question of whether or not they're waiting. It's --
7 it's a question of there are no deals that get
8 announced that are voted -- where a majority of the
9 minority actually works. It just doesn't happen in
10 the real world except for situations, unusual
11 circumstances where there are large minority
12 shareholders. But in general, cases -- there aren't
13 cases where majority-of-the-minority provisions work
14 in this kind of transaction. That's the first --

15 THE COURT: There aren't repriced
16 transactions?

17 MR. STINE: After a merger agreement
18 and --

19 THE COURT: Isn't one of the issues
20 here is because there haven't been real up-front
21 majority-of-the-minority provisions? which is if
22 you're lumping in all your stats, the
23 majority-of-the-minority provisions tacked onto
24 negotiated settlements, is that really an apt

1 comparison?

2 MR. STINE: Well, first of all, you
3 know, I -- you would be -- Your Honor would be in a
4 much better position to know about those kind of
5 tacked-on situations.

6 THE COURT: Well, I just know there
7 used -- I mean --

8 MR. STINE: There used to be -- there
9 used to be --

10 THE COURT: It used to be fairly
11 common.

12 MR. STINE: Right, up until Your
13 Honor's decision in Cox, and then more recently --

14 THE COURT: Well, I would like to say
15 up until Mr. Weiss' objection --

16 MR. STINE: Right, up until --

17 THE COURT: -- eminent member of the
18 plaintiffs' bar.

19 MR. STINE: And I would say that they
20 slowed down after that. But when Vice Chancellor
21 Laster wrote his Revlon decision, I would say they
22 ground to a halt. Maybe there are other situations
23 that they weren't. So --

24 THE COURT: But what I'm getting at is

1 the fact that stockholders don't say no doesn't mean
2 they cannot. And -- and --

3 MR. STINE: It's possible.

4 THE COURT: And it also doesn't mean
5 that it doesn't influence the committee's leverage,
6 because one of the advantages when you have the
7 majority of the minority is that the controller knows
8 going in that the special committee's work is going to
9 have to be subject to stockholder review; right?

10 MR. STINE: Well, that's either --
11 that's either a threat to them or it's not, depending
12 on the situation. So when the situation where the
13 company has all small minority shareholders, I don't
14 think that that's a concern.

15 THE COURT: What company has all small
16 minority shareholders?

17 MR. STINE: Well, it depends on the
18 situation.

19 THE COURT: I mean, I always love when
20 they talk about -- my friends at the SEC still talk
21 about retail investors. If they want to talk about
22 the real retail investor, they're talking about the
23 ordinary person who is -- has to give their money into
24 a 401(k) plan. That's your retail investor. And so

1 what they should be focusing on is the mutual funds,
2 because I don't know about you, but I don't get to
3 pick particular stocks in my retirement savings plan.
4 I don't know anyone who gets to.

5 MR. STINE: Right.

6 THE COURT: And -- and either of my
7 college savings plan do I get to do that.

8 But was there something here that --
9 did they not have institutional investor holdings
10 and --

11 MR. STINE: I don't think that they
12 had any significant ones.

13 THE COURT: What do you mean by
14 "significant"?

15 MR. STINE: I don't know the numbers;
16 but when we looked at it, there was not any -- any
17 that were threatened -- that would threaten the
18 transaction.

19 THE COURT: That's not what I'm
20 saying, which is were there large institutions who
21 held the securities of this case?

22 MR. STINE: Yeah. And -- and I looked
23 at that, and I -- and I don't know the -- the -- the
24 size.

1 THE COURT: Well -- and if you're an
2 individual investor, you might actually have a longer
3 horizon; right?

4 MR. STINE: Well -- but, Your Honor, I
5 still don't think it's a question of horizons. You --
6 you know, I don't think it's a question of horizons
7 because when you announce a --

8 THE COURT: Why do I have to take 25
9 if I get a free chance to vote no if I think the
10 company is worth 31?

11 MR. STINE: I think in the real world,
12 it just doesn't work that way.

13 THE COURT: And that's what I mean.
14 So in the real world, stockholders -- there should
15 always be a risk-free option because there's no -- if
16 you believe the company's worth 31, you can hold the
17 stock. Now, the risk is that you're wrong. The whole
18 bet of a sales transaction is you're saying "I think
19 it could be 31, but I realize it could be 20. I
20 realize it could go down to 17. I now have a chance
21 to get 25."

22 As long as you're freely making the
23 decision, how is it not meaningful?

24 MR. STINE: Well --

1 THE COURT: I mean, the fact that you
2 would like -- we would all like, right -- I would like
3 to be able to eat the same amount of food I used to be
4 able to eat when I was 19. When I was 19, I would --
5 when I was 17, I was "Why can't I gain weight?"

6 MR. STINE: Right.

7 THE COURT: That is not a question,
8 you know -- you get your wishes in life in weird ways;
9 right? So, I mean, whatever wish, you know, I should
10 have taken back the time delayed. Like, the Lord
11 processed my -- my wish, you know, a generation later.

12 So -- but when you're an investor,
13 right, the whole point -- I get the point about tender
14 offers. That's Professor Bebchuk's point; right?
15 which is a takeover is one of these situations where
16 you're afraid that you're left in; right?

17 MR. STINE: Right. And --

18 THE COURT: So you may actually --
19 having a stub equity position, we could all agree
20 that's a dangerous, you know -- if you're down to six
21 or seven, you don't have a float.

22 Here's the situation -- this company
23 is going to have a big float if the merger went down
24 because it's going to have the same float it had

1 before; right?

2 MR. STINE: Right. And --

3 THE COURT: All you're saying is that
4 it's really hard to turn down a 45 percent premium to
5 market when you know for sure you can put that in your
6 bank account. And -- so that's really powerful. And
7 stockholders tend to like that kind of thing, and they
8 tend not to turn it down in exchange for the
9 possibility that the stock might go to 28 or 29;
10 right?

11 MR. STINE: Right. And --

12 THE COURT: Is that involuntary or is
13 that just coming to grips with not everybody was born
14 to be Jay-Z?

15 MR. STINE: Right. And -- and I would
16 respond to that, Your Honor. We all know that in the
17 context of fairness, determining fairness, or in an
18 appraisal that the stock price is really not looked at
19 by this Court in terms of the analysis. You look at
20 the discounted cash flow analysis, comparable company,
21 precedent transaction.

22 And in terms of the timing of this
23 transaction, here's a situation where they were
24 offered that premium. And you're right, you're

1 exactly right. National stockholders looked at that
2 premium and said, "This is a done deal. It's a
3 premium" --

4 THE COURT: No, no. This is a done
5 deal.

6 MR. STINE: Right.

7 THE COURT: There's nothing -- there's
8 a negotiated contract, which -- to which the board
9 approved the transaction subject to the stockholders.

10 MR. STINE: Right.

11 THE COURT: The party that ultimately
12 determined that it was a done deal are the party,
13 you're saying, had no ability to say it was not done.

14 MR. STINE: I'm not saying they don't
15 have the ability. I'm saying in the real world, it
16 doesn't happen. It just doesn't happen. So somebody,
17 a holder of shares --

18 THE COURT: Was there an appraisal cap
19 in this deal?

20 MR. STINE: No. In fact, I think Your
21 Honor had a -- an appraisal cap? No, I don't think
22 so. But there was an appraisal -- you had an
23 appraisal action in this case, I believe. I think --

24 THE COURT: I don't know.

1 MR. STINE: I think you did. I think
2 it was settled. But, anyway.

3 THE COURT: See how I bring a really
4 fresh perspective? because, I mean, I may have had an
5 appraisal action, and it doesn't vividly ...

6 MR. STINE: Right.

7 THE COURT: What I'm saying is
8 sometimes people condition not only majority of the
9 minority, but sometimes the buyer will actually say
10 that you can't have an appraisal petition in excess of
11 a certain amount --

12 MR. STINE: No, there wasn't anything
13 like that. But, Your Honor -- and I don't want to
14 beat a dead horse with this. But the fact is --

15 THE COURT: There are markets for
16 that.

17 MR. STINE: I know, really. In -- at
18 furniture stores, I think; right?

19 But --

20 THE COURT: We actually have some
21 horse meat submarine sandwiches for the students who
22 are --

23 MR. STINE: Right. Do you have names
24 for the horses?

1 THE COURT: Well, you know, we have a
2 selection, actually, of delicious Mid-Atlantic
3 sandwiches for the students. Horse meat had not been
4 a specialty; but in honor of --

5 MR. STINE: Right.

6 THE COURT: -- of our desire for
7 closer ties with the EU, we've --

8 MR. STINE: Right, right. And I think
9 IKEA gives a discount on furniture.

10 THE COURT: Exactly. Many of the
11 students probably have an IKEA card.

12 MR. STINE: Right, right.

13 So -- but I think the situation is, is
14 the majority-of-the-minority provision, is it some
15 kind of a referendum of fairness? Does it provide
16 some -- does it provide some protection for the
17 shareholders to get a fair price? And I think that's
18 what's clear --

19 THE COURT: Let's just pause on that.

20 MR. STINE: Right.

21 THE COURT: Is what you're saying in
22 the vote in this context is actually distinct from the
23 third-party situation? Because in the third-party
24 situation you would say the same dynamic is true --

1 MR. STINE: Right.

2 THE COURT: -- which is when the board
3 of directors signed up a third-party deal at a
4 substantial premium to market, stockholders are
5 overwhelmingly likely to accept it.

6 MR. STINE: Right. That's --

7 THE COURT: Right?

8 MR. STINE: And the difference is --
9 there's a difference between those two situations. In
10 the situation of an arm's length deal, the vote isn't
11 considered some type of protection to the minority
12 against a majority shareholder --

13 THE COURT: Oh, sure it is.

14 MR. STINE: No.

15 THE COURT: That's the whole --

16 MR. STINE: No, but there's no -- but
17 there's no conflict of interest in that situation.

18 THE COURT: No, no. But it -- but it
19 still is a protection. Our law carefully, by
20 statute -- people ignore -- but it's also easy for us
21 to make central our ornamental contributions and lose
22 sight of what's really fundamental.

23 The whole reason why stockholders vote
24 on mergers or asset sales is because of the concern

1 that this is a really substantial thing and you want
2 them, the fiduciaries, to actually be on their toes
3 and to have that subject to ultimate approval by the
4 equity owners.

5 MR. STINE: Absolutely.

6 THE COURT: And that's why there's
7 also burden -- there's standard-of-review effect
8 that's given in third-party situations to approval by
9 stockholders; right?

10 MR. STINE: Right. No; absolutely.

11 THE COURT: All I'm saying is on this
12 point, Mr. Stine, your point that the stockholders
13 don't tend to turn down premium deals, right --

14 MR. STINE: Uh-huh.

15 THE COURT: -- when they don't have a
16 sure other offer that's higher, that in the dynamic
17 where the third-party deal is a 45 percent premium to
18 market and the stockholders believe, you know, "We
19 really think it should be a 53 percent premium," where
20 they have the ability to vote down the 45 percent
21 premium and continue to own the stock and see whether
22 their view of value comes true, they almost always
23 take the 45 percent premium.

24 MR. STINE: I think they almost always

1 take the 45 percent premium. I think they almost
2 always take the 25 percent premium or the 15 percent
3 premium.

4 THE COURT: Again, I mean, one of the
5 problems is you do know that you're arguing -- what
6 you're saying about the behavior of stockholders,
7 right --

8 MR. STINE: Yes.

9 THE COURT: -- suggests that they're
10 really not adults.

11 MR. STINE: Well --

12 THE COURT: What I mean by "adults" is
13 people who have to actually -- you're allowed to make
14 choices, but you understand that with every choice
15 comes a downside.

16 MR. STINE: Right. I -- I totally
17 agree with you, Your Honor. But to go back to the
18 difference between an arm's length deal and this kind
19 of deal where there's a controller, is in an arm's
20 length deal we all know that shareholders have
21 their -- whatever reason they have for voting, whether
22 it's they need the money for their, you know, kids'
23 college or whether they don't like -- you know, it's a
24 bad day for them, whatever reason they have, they're

1 allowed to vote in favor or against a deal in an arm's
2 length transaction. And that's the way -- the way it
3 is; right?

4 But in a situation here, where you've
5 got Ron Perelman, who's the 800-pound gorilla in the
6 room, the law has been set up to protect minority
7 shareholders from that situation, where -- where
8 there's coercion, where there's a --

9 THE COURT: But what is the coercion
10 here --

11 MR. STINE: -- conflict of interest.

12 THE COURT: -- other than, again -- I
13 would put it the inherent coercion. This is the
14 theory that was first in the du Pont case, that
15 essentially if you have a controller, everybody's just
16 afraid. Why -- what, based on market behavior about
17 stockholders in this day and age, suggests that
18 they're afraid?

19 MR. STINE: See, that wasn't the -- I
20 understand.

21 THE COURT: No. But that is the
22 premise of inherent coercion --

23 MR. STINE: No.

24 THE COURT: -- which is that you can

1 never -- that no matter what anybody says, you're
2 hovering in fear from Mr. Perelman.

3 MR. STINE: See -- see, I don't
4 necessarily agree with that. I think that more --
5 first of all -- my -- my point really wasn't about the
6 coercion. It was more about the right, against
7 somebody who is in a conflict situation and sitting
8 there. I think there's probably more coercion over
9 this supposedly independent board --

10 THE COURT: Than over the
11 stockholders.

12 MR. STINE: -- than over the
13 stockholders, right. So -- because the independent
14 board, these are all people who -- supposedly
15 independent board. These are all people who have
16 known him for years. Whether they worked with him or
17 not, they're together. Here's a guy who I am sure is
18 difficult to say no to; right?

19 And -- and so it's kind of off topic,
20 the point; but to go back to -- and I'd like to stick
21 on this idea of the majority of the minority because I
22 don't think it's been explored.

23 I think that a difference between the
24 arm's length transaction where people are allowed to

1 vote whatever they want and that's just the result of
2 it and they have different reasons and in a situation
3 with a controller, it isn't just a vote. It isn't
4 just a vote on something. It's a protection. And --
5 and the -- it's supposed to be a protection. And my
6 point, and our point, is it really isn't a protection
7 that people say it is. It's not really the
8 protection, because the arbs come in. They buy it.
9 People decide whether or not they want to sell the
10 shares based on, you know, whatever the reason; but --
11 but the fact is in the real world, it almost always
12 goes through, if not always, you know.

13 And I was trying to think of
14 situations. Vice Chancellor Laster, I think in the
15 CNX decision, gave some examples in -- of where he
16 said that there were majority-of-the-minority
17 provisions that -- that were successful. And I -- I
18 know about the Revlon situation that he pointed to.
19 But there was an exchange -- it was an exchange
20 transaction for, you know, preferred shares for -- for
21 common shares. It wasn't the same kind of situation
22 where arbs would come in and buy --

23 THE COURT: But isn't part of the
24 point the vote -- the dynamic you're worried about is

1 that the special committee is overwhelmed in some sort
2 of way by Mr. Perelman? But that the fact that
3 there's the majority-of-the-minority provision creates
4 good incentives for the committee as well, because
5 independent directors also have reputational issues
6 and things that they have to deal with. Many
7 independent directors serve on multiple boards.
8 There's a thing that changed its name to something
9 that sounded like a kind of low-end California
10 vineyard. And I think it's back to its three initials
11 now, but they're pretty powerful. And they monitor
12 these things, and they take into account director
13 behavior. And there are institutional investors who
14 do.

15 Because when you just said, again, the
16 arbs come in, again, that's a voluntary decision of
17 the stockholder who was a long-term holder to say that
18 the price was enough and that "I want to take that
19 price now."

20 That -- that happens all the time.
21 And I don't know how it contradicts the theory. And
22 isn't it true that majority of the minority is a
23 contextually specific device that's not in the DGCL
24 itself except in 144; right?

1 MR. STINE: Right.

2 THE COURT: So it's something on top
3 of -- this would have required a stockholder vote and
4 votes beyond Mr. Perelman to be accomplished, in any
5 event; right?

6 MR. STINE: Right.

7 THE COURT: He didn't have enough
8 votes to accomplish it.

9 MR. STINE: He was short. I think he
10 said 40 -- 43 percent, something.

11 THE COURT: Right. So in order to --
12 he would have had to have gotten votes. But what this
13 does is say "Mr. Perelman, your votes don't count."
14 It takes him, practically speaking, to zero influence
15 over the vote in terms of being able to push the vote
16 through; correct?

17 MR. STINE: That's right. Yeah; no.
18 I understand that, Your Honor. It really --

19 THE COURT: And then the theory would
20 have to be that -- you're not saying stockholders
21 voted -- they're influenced by their economic dynamics
22 of the risk of holding when they can get a premium.
23 It's not that they really think that if
24 Mr. Perelman -- if the vote went down, that

1 Mr. Perelman is going to be able to --

2 MR. STINE: I don't --

3 THE COURT: -- pillage --

4 MR. STINE: -- personally, I don't
5 believe that. I mean, I think it's the economic
6 situation. You know, they announce a merger
7 transaction. The stock goes up to 20 cents below the
8 merged transaction. They look and they say, "I'll
9 take it now. You know, there might be a risk that the
10 thing is going to fall apart."

11 THE COURT: I mean, what is better for
12 stockholders -- I mean, why is it better for
13 stockholders -- let's assume the following: Let's
14 assume that I read Lynch your way and I conclude "If
15 you do both, you don't get any extra credit."

16 MR. STINE: The shift of the burden.

17 THE COURT: Yeah. You know, "I do
18 both. I don't get any extra credit. I don't need
19 both to get credit. I'm not going to do both."

20 MR. STINE: Right.

21 THE COURT: No stockholders are going
22 to get this package or protection. Why is the value
23 of litigation under entire fairness lite sufficiently
24 valuable to stockholders to deny them an incentive

1 system where you get a combination of protections that
2 replicates a genuine third-party deal? So you get a
3 special committee with the real ability to say no; and
4 even if the special committee says yes, you, as a
5 stockholder, get the free and uncoerced ability to
6 vote no. So you're going -- it's two starkly
7 different worlds, which is there's going to be a risk
8 in the world where you give effect to those two
9 devices, that in a particular case somebody is going
10 to say "Those two devices didn't work as well as we
11 would like." So there's a cost. There's no --

12 Again, I'm not like -- I view people
13 as being adults. There's a cost to every rule. But
14 in that rule the gain has to be that litigation
15 itself, the litigation-intensive standard produces
16 some sufficient benefit to outweigh the cost that you
17 will never get the two devices used in tandem
18 up-front.

19 MR. STINE: Well -- and the answer to
20 that is -- I mean, we cite in our brief -- I think
21 it's in a footnote -- that in Siliconix -- after
22 Siliconix there was a study done by Professor Sub --

23 THE COURT: Subramanian.

24 MR. STINE: -- Subramanian.

1 THE COURT: Hockessin, Delaware, boy.

2 MR. STINE: What's that?

3 THE COURT: He's a Hockessin,
4 Delaware, boy.

5 MR. STINE: Yeah. Good.

6 (Continuing) -- where, post Siliconix,
7 he looked at the premiums and --

8 THE COURT: People don't know that in
9 Hockessin. A story written about one of the most
10 distinguished corporate law scholars in the country,
11 dual-tenured Harvard Business School, Harvard Law
12 School, Hockessin, Delaware, boy. Mr. Allingham
13 famously tangled with him in Toys "R" Us.

14 MR. ALLINGHAM: (Inaudible)

15 THE COURT: Sorry for that shot.

16 MR. STINE: It's a little side ...

17 He did a study. And it's not one of
18 the conclusions of the study; but if you look at the
19 chart in his -- his paper, post-Siliconix controlled
20 buyouts had greater premiums than post-Siliconix
21 controller tender offers.

22 Now, you can look at that and say
23 okay, here's a situation where, with a buyout that's
24 subject to -- to entire fairness and the threat of --

1 of litigation like this, that the share -- that the --
2 that the special committee and the -- the controller
3 himself is going to be more apt to provide --

4 THE COURT: But aren't you drawing a
5 lesson from that data that Professor Subramanian
6 himself does not draw? Isn't what he -- the lesson he
7 draws from it, that if you do a stockholder referendum
8 in isolation without an effective negotiating agent
9 for the stockholders, that you get lower outcomes than
10 when you're in a legal rubric where there's incentive
11 for a special committee?

12 And I thought Professor Subramanian
13 actually comes out to the policy conclusion of him
14 looking at the landscape; that if the -- if
15 stockholders -- that the best of all worlds for
16 stockholders, in terms of reducing litigation where it
17 doesn't provide value to stockholders and getting them
18 a fair pricing, is to give credit when both
19 procedures, both a negotiating agent and an uncoerced
20 stockholder approval mechanism, are used; and that the
21 flaw in Siliconix is that you can go right to the
22 stockholders with a so-called tender offer. A tender
23 offer, for the reasons Professor Bebchuk and others
24 have written about, is not the same as a merger vote.

1 It's binary because you've had no negotiating agent.
2 And so you tend to get a lower price.

3 MR. STINE: Right. I -- first of all,
4 Your Honor, I -- I acknowledge Your Honor's a scholar
5 in this area.

6 THE COURT: I don't know that I'm a
7 scholar. I just have read a lot of junk.

8 MR. STINE: Well, you've read a lot
9 and you've written on the subject.

10 THE COURT: Not junk. By "junk" I
11 mean the good stuff.

12 MR. STINE: The good stuff, of course.
13 I think it's hard to imagine -- all right. I'll back
14 up.

15 THE COURT: I mean, isn't Professor
16 Subramanian's bottom line that when he looks at the
17 data, he says an independent special committee with
18 the right mandate, plus noncoerced informed
19 majority-of-the-minority vote should get business
20 judgment rule protection?

21 MR. STINE: I think it does. But --
22 but to -- I don't necessarily -- I obviously don't
23 agree with him.

24 THE COURT: I understand. I'm saying

1 the data you're providing is his data. The
2 conclusion, you would admit, he draws from the data is
3 different on a policy basis than yours.

4 MR. STINE: I absolutely agree with
5 that, but I think that the data shows what the data
6 shows. And I think from experience -- I mean, this --
7 this was a paper written a few years back. But I
8 think that experience from the cases post Cox and post
9 CNX is that -- that entire fairness cases get
10 litigated, and they are being litigated, as an example
11 here, postclosing more and more. And plaintiffs --
12 the plaintiffs' bar is being -- is faced with
13 situations where they look and they say, "Oh, what did
14 I sign up for here, you know?" Is there a case where
15 there actually is an unfair price? Because the
16 defendants certainly are coming, saying "Let's settle
17 this thing right away."

18 So here's this dynamic where
19 defendants are fighting them, and defendants are
20 saying, "This was a fair transaction. We're going to
21 litigate." And plaintiffs are saying, "This is" --
22 "is this an unfair or fair transaction?"

23 If it's unfair, we have -- we're in a
24 postclosing land that we weren't in before, where

1 we've got experts, not the kind who, you know, you
2 have to pay a few thousand dollars to to give some
3 kind of an opinion for a PI, but you have to pay hefty
4 amounts of money and make big commitments on. So the
5 dynamics switched to real litigation, you know, real
6 litigation about real transactions.

7 So it's a situation where here's a
8 controller, and he's in a situation where he's
9 negotiating a deal, and he's saying with his advisors,
10 "If I don't offer a fair price here, I'm going to get
11 sued by Mr. Monteverde or Mr. Stine" or whoever, "and
12 they're going to hire experts. And I'm going to have
13 experts, too. And what's my expert going to say? Is
14 my expert going to say this is a fair price or is this
15 an unfair price?"

16 Let's -- let's think ahead here,
17 right, because that's what's going to be important.
18 And I don't want to come up with a situation like, you
19 know, Southern Peru where we're going to be -- have to
20 shell out billions of dollars in litigation. Let's
21 just do it the right way to start off with.

22 So it comes back to real litigation,
23 which -- which, you know, Your Honor, I hope -- I
24 think what you were looking for when you wrote Cox was

1 that there be real litigation --

2 THE COURT: I wasn't really looking --
3 again, I think there's a lot of mystery around Cox.
4 I -- I was not looking for anything.

5 MR. STINE: Well -- but --

6 THE COURT: Mr. Weiss made -- had made
7 three previous objections in the earlier iterations
8 brought here by another plaintiff -- another of your
9 colleagues in the plaintiffs' bar.

10 MR. STINE: Right.

11 THE COURT: He then sought fees on
12 fees for his objections. I recall where he objected
13 to a fee; and when I cut the fee, he wanted a fee for
14 his contribution in cutting the fee.

15 MR. STINE: Right.

16 THE COURT: But I -- I wanted nothing
17 of Cox but for it to go away.

18 (Laughter)

19 MR. STINE: Understood.

20 THE COURT: It did not.

21 (Laughter)

22 MR. STINE: Understood. But --

23 THE COURT: And part of why I
24 understand the literature here is it was a big debate

1 about literature, if you read Mr. Weiss' -- not
2 surprising, given that he was a professor at the time.

3 MR. STINE: Right. Right. So -- so
4 --

5 THE COURT: But he apparently met some
6 people who do your line of work. And he's a good guy
7 and he -- you guys took him into the bosom of your
8 side of the V.

9 MR. STINE: Right. So --

10 THE COURT: I don't know if he's still
11 there or not. Do we know?

12 MR. STINE: I don't know, Your Honor.

13 So to -- to move on -- and we've
14 talked a lot about the reasons why -- and, Your Honor
15 -- you know, I haven't dealt with the arguments at all
16 about the special committee is not independent.

17 THE COURT: Well, let me just -- on
18 the one thing, what is -- how do I conclude that the
19 fees paid to the Bancroft firm are material?

20 MR. STINE: Well --

21 THE COURT: What's the standard?

22 And -- because if you didn't ask anything about the
23 denominator --

24 MR. STINE: Your Honor, I -- I don't

1 think that we get there today based on the motion that
2 they made. They --

3 THE COURT: Well, I think we have to
4 get there today, because I would say that, at the very
5 minimum, they would have to establish that it was --
6 that -- that there's not a -- a triable issue of fact
7 about the independence of the special committee.
8 Right? I mean, the whole premise of the burden -- of
9 the business judgment rule would be that it was an
10 independent committee, the members were independent of
11 Mr. Perelman for purposes of our law. And that's why
12 I'm asking about the materiality of the fees involving
13 the Bancroft firm to Mr. Dinh.

14 MR. STINE: Right. Well --

15 THE COURT: Would you admit that
16 there's nothing in there -- I mean, your friends say
17 that you-all did not ask anything about Mr. Dinh's
18 denominator.

19 MR. STINE: We asked about the
20 amounts, and I don't see --

21 THE COURT: The amounts, but there's
22 nothing in comparison.

23 MR. STINE: I understand.

24 THE COURT: And that's important;

1 right?

2 MR. STINE: Well, I think it's -- I
3 don't think that --

4 THE COURT: And Mr. Webb, for example,
5 would you concede he's, like, a seriously rich dude?

6 MR. STINE: Listen, I wouldn't be
7 surprised if he's a seriously rich dude; but I think
8 that the point that we're trying to make about
9 Mr. Webb is not so much that he was beholden in terms
10 of dollar amounts to Mr. Perelman. I think that what
11 you see here is a pattern with the whole board about
12 these relationships that they had.

13 THE COURT: And I get that. And
14 that's -- I mean, that's an important debate within
15 American corporate law that goes -- that predates
16 Aronson versus Lewis. But, you know, at the Yogi Bera
17 moment the fork was taken. When you got to the fork,
18 they took it. And the direction that they took it in
19 was that so-called structural bias, simply because
20 people had relationships, that that was not
21 sufficient; that in order for them to not be
22 independent, there had to be a quality of
23 beholdenness, where there was a materiality to the
24 relationship such that the relationship was

1 sufficiently tangible to where the party would not put
2 that relationship at risk by saying no in a
3 transactional setting.

4 I mean, I had a situation -- obviously
5 you can strain this. I had a situation where the
6 brother-in-law of a controller was independent of him
7 on the presumption that brothers-in-laws don't
8 necessarily like their -- each other. A person might
9 recall I pointed out, "Well, if they didn't really
10 like each other, why was he on the board of all the
11 guy's companies?" I don't know if that's scratching
12 memories of anyone here.

13 But is -- is -- so I get that. And I
14 think people say "mere friendship." There's a
15 difference between mere friendship, right, someone has
16 lunch, or dinner a couple times, a year; right? If
17 you rent a vacation house with your family every
18 summer for five years, that's not mere friendship.
19 You're drawing next generations, other people into it.
20 And so these things are contextual.

21 But I thought Aronson versus Lewis
22 pretty clearly slammed the door on the mere fact that
23 people are -- travel in the same world means they
24 can't act independently of each other on a negotiating

1 committee.

2 MR. STINE: Right. And I think that
3 we do more than that overall. But I just --

4 THE COURT: Well, Mr. Webb, for
5 example, he doesn't know his wealth to Mr. Perelman,
6 does he?

7 MR. STINE: I -- you know, he -- he
8 was in a situation where he was partners with --

9 THE COURT: They made a lot of money
10 together; right?

11 MR. STINE: Let -- let's say they were
12 current partners. I mean --

13 THE COURT: But they were co-fat cats,
14 and they made opportunistic killings -- not actual
15 killings --

16 MR. STINE: Right.

17 THE COURT: -- like metaphorical --

18 MR. STINE: Right. But -- but, Your
19 Honor --

20 THE COURT: They made literally
21 metaphorical killings --

22 (Laughter)

23 THE COURT: -- to use the current way
24 of talking.

1 MR. STINE: Right.

2 THE COURT: Literally metaphorical
3 killings.

4 MR. STINE: (Inaudible)

5 THE COURT: Exactly. And so together,
6 a couple decades back or a decade or so back; right?

7 MR. STINE: Right. Yeah, but I think
8 that the question is not whether he only made the
9 money because of Mr. Perelman, but you have to look,
10 well -- if they were current partners -- like, if they
11 were current brothers-in-law, it doesn't necessarily
12 mean that the brother-in-law in the example that Your
13 Honor gave, always gives money to his brother-in-law.

14 THE COURT: No, no. But what you
15 presume in the brother-in-law situation is, one, you
16 don't put your brother-in-law on the board if you have
17 a strained relationship. The problem with the
18 brother-in-law situation is if you're the
19 brother-in-law, you're married to the sister. The
20 sister has a relationship with their brother.

21 MR. STINE: Right.

22 THE COURT: There might even be that
23 the sister and the brother might just share a mother
24 and a father.

1 (Laughter)

2 THE COURT: The cousins may just be
3 friends. And it all gets really icky.

4 MR. STINE: Right.

5 THE COURT: And there's all kinds of
6 things in people's mind.

7 Now -- and I also think it's
8 contextually different. Like, I happen to view
9 accusing someone of a crime as a different level of
10 being able to say no than saying no on a transaction.

11 MR. STINE: Right.

12 THE COURT: Right? I mean, like, if
13 you actually -- I had a case that involved insider
14 trading accusations. Well, you're going to accuse
15 somebody of insider trading. That's kind of, like,
16 you know, "Hey, cousin, got the bad news. The good
17 news is we're all still going to be friends; right?
18 We all decided we were independent of each other. The
19 bad news, I've concluded that there are good grounds
20 to believe you committed insider trading, and we are
21 authorizing the company to bring suit, and likely it
22 will draw the U.S. Justice Department into the thing."

23 MR. STINE: Right.

24 THE COURT: "But we're all good";

1 right?

2 MR. STINE: Right. So --

3 THE COURT: I think that's a little
4 different conversation than "I think you're
5 going-private price is too low."

6 MR. STINE: Right, right. A little
7 bit different.

8 Your reference to ickiness with
9 this --

10 THE COURT: Right.

11 MR. STINE: -- I think that that
12 really, kind of, is the word. It's the degrees of
13 ickiness here.

14 THE COURT: And then what you're
15 saying is -- I would tend to agree with you, as part
16 of my colloquy with your friend for the special
17 committee, was every -- every member has a little bit
18 to explain; right?

19 MR. STINE: Right. Exactly right.

20 THE COURT: But do you get to a point
21 where if everybody has a little to explain, it adds up
22 to material or do you have to actually, under our law,
23 under Mr. Allingham's favorite line of cases, do you
24 have to actually go director by director? I thought

1 Technicolor and other cases said you have to actually
2 look at the specific director and make a judgment
3 on -- as to that director about materiality. And I
4 think Martha Stewart, the case -- may be actually the
5 person, too, but the Martha Stewart case says the same
6 thing.

7 MR. STINE: Right. Well --

8 THE COURT: I don't know what she's
9 saying on the show about --

10 MR. STINE: I think in the context of
11 when there's a special committee and whether or not
12 one or more of these infect the process, I think it's
13 a little bit different.

14 And I just -- Your Honor, in the -- in
15 the Southern Copper case, the reason why Your Honor
16 didn't shift the burden was you found that that
17 analysis was fraught with factual complexity. And I
18 think -- and that had to do with the special committee
19 independence. And you said, "... [and] will rarely be
20 determinable on the basis of the pre-trial record
21 alone."

22 And the Supreme Court acknowledged the
23 position that Your Honor took with that and said, "...
24 the general inability to decide burden shifting prior

1 to trial is directly related to the reason why entire
2 fairness remains the applicable standard of review,
3 even when an independent committee is utilized, i.e.,
4 'because the underlying factors which raise the
5 specter of impropriety can never be completely' --
6 "'never be completely eradicated and still require
7 careful judicial scrutiny.'"

8 I think that --

9 THE COURT: But that's why I think
10 what your friends' motion is premised on, is when you
11 use both devices up-front in tandem, they have an
12 effect together that they don't have in isolation.
13 And Lynch itself, for example -- as I mentioned
14 before, Lynch itself, the threat the committee was
15 rendered -- the concern about its independence -- or
16 to mandate its ability to say no, the controller
17 basically said, "Well, if you say no, it doesn't
18 matter because the other people can say yes. And
19 we'll present to them a tender offer," which, for all
20 the reasons you would say were -- all the reasons you
21 gave for why a vote is not enough, apply more fully to
22 a tender offer.

23 MR. STINE: Right.

24 THE COURT: I think what your friends

1 are saying here is the standard they want is good
2 old-fashioned corporate Delaware law.

3 MR. STINE: Well --

4 THE COURT: A strong brew, which is if
5 you don't do it the right way, you get entire
6 fairness. But if you do it the right way, there's a
7 nonlitigation-intensive way to get the business
8 judgment rule standard, which is an independent
9 committee meeting the recognized tests for
10 independence under our law, with the appropriate
11 mandate and the ability to say no and recognizing
12 up-front that even if they say yes, the deal will only
13 go through if there's an informed, uncoerced vote.

14 MR. STINE: Right.

15 THE COURT: And they're saying if you
16 establish those things up-front, you should get
17 business judgment rule, and business judgment rule
18 means we don't go back and say "Well, you know, if you
19 added Warren Buffett to that committee, they would
20 have gotten another dollar and a quarter."

21 But that's the difference between
22 entire fairness and what they're asking for.

23 MR. STINE: Right. And I understand
24 that. I get that.

1 THE COURT: And what they're saying
2 about the difference between Southern Peru is that
3 under the existing line of the "or," you have to get
4 down into the dough of fairness, anyway. And the
5 reason why no one wastes a lot of time on burden
6 shifting is, as I understand the burden, what you got
7 is only if -- I mention this because I'm a kid and I
8 remember one of the most painful things is -- did you
9 ever fall off the front of your bike seat and you land
10 on that bar and you're just stuck there? You can't
11 talk because you're in excruciating, agonizing pain,
12 and you think that your ability to have a future
13 generation has been entirely lost.

14 If you're stuck there on that bike, as
15 I understand what the burden shift does, is the
16 other -- the party who has it gets to just push you
17 and you fall off the other side of the bike; right?

18 MR. STINE: Right.

19 THE COURT: Under a preponderance
20 standard. And so no one ever cared about it.

21 I think this standard -- I think what
22 Mr. Allingham and his friends are arguing for is, it's
23 not that approach to it. You -- you do the things
24 that classically cleanse an interested transaction,

1 but you do them together. You actually do not just
2 one of the things that 144 says; you do them together.
3 The litigation intensiveness of the fairness review is
4 actually out of the process.

5 MR. STINE: Right. And, Your Honor --

6 THE COURT: And I say there's risks to
7 that; right?

8 MR. STINE: And, Your Honor, I
9 understand. It's what Your Honor talked --

10 THE COURT: What I don't understand
11 is, I don't believe there's any value to saying you
12 get business judgment rule if you pass entire
13 fairness, which is there's no -- I mean, what I mean
14 is if up-front what you have to do is to say "Would I
15 have made every move or not" -- "or decided not to
16 make every move that Mr. Meister and the committee
17 made, would I have pressed back, using certain
18 valuation metrics to get, sort of, higher" --

19 MR. STINE: Right.

20 THE COURT: If you're down into that,
21 you're not -- you're not even talking about them
22 qualifying for the business judgment rule. You're
23 talking about some factually intensive heightened
24 review process.

1 MR. STINE: You're talking about a
2 situation where, at the pleading stage, you can
3 dismiss what would be generally --

4 THE COURT: Well, I mean, I'm talking
5 about summary judgment, which is I think there's a big
6 difference of whether you're looking at whether the
7 committee is structurally empowered in the right way
8 in a controller situation so that they can effectively
9 say no and have bargaining power, whether they engaged
10 in an obviously rational process in terms of actually
11 having meetings and being able to pick their own
12 advisors, having the right mandate. I think those are
13 very distinct up-front things that people can assess.

14 If you're getting down into
15 substantive fairness review, combining process and
16 price, and seeing whether it came out like an arm's
17 length transaction, that's fairness review; right?

18 MR. STINE: Well, that's --

19 THE COURT: That's what you do in a
20 fairness review; right?

21 MR. STINE: Right, that's what you do
22 in a fairness review.

23 THE COURT: So if you do not, you
24 don't do that -- that's exactly what the business

1 judgment rule was about. It's that when you're in
2 business judgment rule land, you don't do that.

3 MR. STINE: See --

4 THE COURT: What I'm saying is I don't
5 know -- there's not a real in-between here; right?

6 MR. STINE: Well, that's a good
7 question. I mean, I don't know whether there's a real
8 in-between --

9 THE COURT: Well, what is the
10 in-between? Because if the in-between is -- and this
11 is where I thought you started with a strong point and
12 I want to hear from your friends, which is your
13 friends say they starkly want business judgment. Part
14 of why you said "I didn't get into" -- "I put in some
15 things to kind of cast doubt on it, but I didn't feel
16 like it was my burden at this point to actually engage
17 whether entire fairness lite was the standard and,
18 thus, I have the burden of persuasion under the
19 preponderance thing. So I didn't get my financial
20 expert at this point. That wasn't the motion I was
21 confronted with."

22 MR. STINE: Right.

23 THE COURT: Which suggests that in
24 your own mind it's a distinct concept; right?

1 MR. STINE: Right.

2 THE COURT: To be in business judgment
3 rule. You were saying why it shouldn't be business
4 judgment rule.

5 MR. STINE: Right. And -- and we do
6 say in our -- I'll just say we do say why we -- even
7 if it's business judgment rule, why summary judgment
8 still is inappropriate. We say that. And I
9 understand. But -- but you're right. It's a
10 different situation.

11 But ... All right. If it -- if it's a
12 Cox/CNX situation and it's not a -- and they had both
13 starting off with and then it --

14 THE COURT: Shouldn't this case
15 actually be CMX?

16 MR. STINE: CMX?

17 THE COURT: Yeah. I mean, if we're
18 going to go sequentially like this, it really should
19 be CMX. I don't know if anybody but me has ever
20 noticed that, but I always thought it was odd. It's
21 like some DNA sequencing.

22 MR. STINE: Right. I don't -- I think
23 under Kahn versus Lynch, I think it's pretty clear --
24 and especially under -- you know, Your Honor talked

1 about dictum at the Supreme Court versus holding. And
2 I think that there's always the -- you know, the --
3 the statement that you hear over and over is there's
4 dictum and there's good dictum. You know, the fact is
5 that --

6 THE COURT: Good dictum is dictum that
7 you like?

8 MR. STINE: Well, dictum is dictum
9 from the Delaware Supreme Court that says what they
10 think that the law -- the law is in a certain area.
11 And I think it's pretty clear that they think that
12 Kahn versus Lynch applies and that in any controller
13 situation --

14 THE COURT: Well, let me ask what my
15 legal duty is, though. I owe a duty of fairness to
16 your clients and a duty of fairness to all parties to
17 apply the law.

18 MR. STINE: Right.

19 THE COURT: If a question has not been
20 spoken to, do you apply dictum and act like it has
21 been spoken to? Or do you have to actually address
22 the question and then give the Supreme Court your
23 honest view as a trial judge on the open question and
24 say -- admit that they have language that's at

1 tension -- they have dictum that's at tension with the
2 holding but, nonetheless, it is dictum; that
3 ultimately it's up to the Supreme Court to decide this
4 question for itself, but the trial court needs to
5 address with an open mind the question that's not, in
6 fact, been presented, squarely presented, by prior
7 cases?

8 MR. STINE: And I'm sure Your Honor
9 has dealt with the situation in the past, as have all,
10 you know, trial judges throughout the country all the
11 time. It's a situation where there's a -- you know,
12 something is not on all fours --

13 THE COURT: Well, no. I think Airgas,
14 for example, was a situation where you could take
15 various Supreme Court decisions and, you know, could
16 reach a different conclusion. For example, I don't
17 believe -- there is only one purpose to a poison pill,
18 and that's to preclude an offer.

19 MR. STINE: Right.

20 THE COURT: But the Unocal test says
21 that if you preclude, and then it says that you can
22 go -- well, then there was other law that says you can
23 go do an election contest. Well, Moran said there
24 were two ways around the pill. Not just an election.

1 MR. STINE: Right.

2 THE COURT: It said that the Court
3 would enjoin the operation of the rights plan if it
4 wasn't a reasonable thing. Then you had Unitrin and
5 other things that said things are unreasonable if
6 they're preclusive.

7 And -- and then, I think, Chancellor
8 Chandler parsed it correctly, which said the only way
9 you take law -- yes, you can preclude -- you can
10 actually preclude if you have a reasonable basis to
11 believe that stockholders would be making a mistake to
12 take the bid, even as to a noncoerced offer. But it
13 took awhile for the law to, kind of, get to that
14 place.

15 And, I mean, I appreciate candor. I
16 don't think there's ultimately an answer to this --

17 MR. STINE: Right.

18 THE COURT: -- because we talked about
19 before -- even the judges who wrote the previous
20 decisions are not the same people anymore.

21 MR. STINE: Right.

22 THE COURT: I mean, just -- that's
23 just not how the world works and --

24 MR. STINE: Well, Southern Copper was

1 recent. But --

2 THE COURT: And it was. But, again,
3 that was precisely not posed by that case; right?

4 MR. STINE: That's -- that's true.
5 But in -- I think they went out of their way to say
6 things that were necessary for the decision. They
7 went on pages about entire fairness in Kahn versus
8 Lynch. I don't think -- all they needed was one
9 sentence.

10 THE COURT: Well, I think part of why
11 they did, because something was at issue in that case.
12 If you recall, there was a complaint on appeal by new
13 counsel, I believe, for the defendants that the burden
14 shift had not been determined before trial.

15 MR. STINE: Right.

16 Unless Your Honor has other questions
17 ...

18 THE COURT: No. Thank you, Mr. Stine.

19 MR. STINE: Okay. Thank you.

20 THE COURT: Mr. Allingham and
21 Mr. Mundiya. If -- I think we've -- if you could be
22 pointed. You're between --

23 MR. ALLINGHAM: I see the time, Your
24 Honor.

1 THE COURT: You're between hunger -- a
2 reporter who wishes to kill me -- and she should --
3 and students and delicious subs from, I believe
4 Capriotti's.

5 MR. ALLINGHAM: The pressure is
6 overwhelming.

7 (Laughter)

8 THE COURT: They've never had a Bobby.

9 MR. ALLINGHAM: The surprise at having
10 to argue about summary judgment on this motion -- on
11 entire fairness on this motion, we teed up the issue
12 in our opening brief at pages 31 and 32. Burden
13 shifting is explicitly argued there. Did the
14 plaintiffs think, nevertheless, that this was just a
15 binary bright-line motion or did they understand that
16 it was more? To get the answer to that, Your Honor,
17 look at the discovery they asked for.

18 THE COURT: Let me just look at --
19 wait a minute.

20 Yeah. There's a problem here, though.
21 What you say is what you should get is summary
22 judgment on burden shift.

23 MR. ALLINGHAM: Sure. And -- and did
24 the plaintiffs continue to think that this was a

1 bright-line argument? The answer is no. If you look
2 at the discovery that they asked for, it was broad and
3 it addressed issues that relate to entire fairness.

4 THE COURT: But as a matter of
5 precision, your motion was, at best, that if you were
6 denied your argument on the -- your ... if you were
7 denied your argument about business judgment rule,
8 that you would get a burden shifting, to go into trial
9 with a burden shift. Isn't that precisely what your
10 brief says?

11 MR. ALLINGHAM: That's the argument on
12 pages 31 and 32.

13 THE COURT: Well --

14 MR. ALLINGHAM: What then happened in
15 the plaintiffs' brief was that they made 15 pages of
16 arguments on entire fairness, pages --

17 THE COURT: Well, they make arguments
18 on entire fairness or ...

19 MR. ALLINGHAM: They have 12 to 15
20 pages, Your Honor, attacks on the price which would
21 have been entirely unnecessary.

22 THE COURT: No, no. I mean, what they
23 say is this: They have headings "Even if the Court
24 follows" -- this term "unifying standard," I'm not

1 always -- somehow makes me think of the Soviet Bloc or
2 something.

3 But the -- that even if that applies,
4 that the special committee was not independent, was
5 not fully empowered; and they questioned things about,
6 right -- earlier they, obviously, have stuff about the
7 buyout.

8 MR. ALLINGHAM: Yeah, the buyout price
9 was unfair to MFW shareholders with subsections.

10 THE COURT: But part of that is you
11 pour in -- you have your own
12 patriotic-trumpets-blaring part of your brief, which I
13 don't -- I think would be unsurprising for you not to
14 have. But as a very precise matter, your request for
15 summary judgment in your brief is to apply the
16 presumptions mandated by the business judgment rule
17 and grant the motion for summary judgment. Then at
18 the end of the brief the same thing is repeated, "...
19 find that Defendants' decision to enter into the
20 Merger is protected by the Business Judgment Rule
21"

22 And what you're saying on page 31 and
23 32 is, "At the very least, though, Judge, if we lose
24 on that" -- now, you do say "at the very least," but I

1 take that like a plaintiff's -- like a complaint,
2 where it says "damages of at least," because you never
3 want to sell yourself short. At the very least, you
4 get a burden shift in the ultimate trial.

5 MR. ALLINGHAM: I -- I think that I
6 made my point, Your Honor. I don't --

7 THE COURT: I'm saying -- I'm not
8 saying that your -- I understand they joined issue
9 with you. It would be impossible for even the most
10 moderate of lawyers, let's say, you know,
11 Mr. Bouchard, Mr. Lafferty, like the most unruffled
12 of, you know, practitioners, right, Mr. Monteverde,
13 people of equilibrium and calm temperament, they would
14 be unable to face your opening brief without
15 commenting something on the price; right?

16 MR. ALLINGHAM: I take your point. My
17 only point is this motion progressed from the opening
18 brief through the answering brief to the reply
19 brief --

20 THE COURT: I understand that. But
21 what they -- their job in their answering brief is to
22 meet your motion. And your motion was predominantly,
23 almost exclusively about business judgment rule, which
24 is why your client took on this -- I mean, your

1 client -- not why. But your client -- what your
2 client was saying is, "I did these two powerful things
3 together, and I get credit for it." That's the major
4 part of the motion.

5 And then on 31 and 32, what you've
6 been able to point to is, "Well, at the very least,
7 though, if we don't win on our major argument, then we
8 get -- going into the trial, we get the burden shift
9 under the Lynch standard as the plaintiffs articulate
10 it."

11 MR. ALLINGHAM: That is -- that's
12 correct, Your Honor.

13 THE COURT: As a formal matter. I'm
14 saying there might be a spirit -- you know, like, we
15 have the spirit of the remand. That might be the
16 spirit of the briefing where it's evolved; but if
17 you're looking formally within the four corners of
18 your opening papers, this is the motion.

19 MR. ALLINGHAM: And -- and Your
20 Honor's latter point is the point I was trying to
21 make.

22 THE COURT: Okay.

23 MR. ALLINGHAM: The second point I
24 want to make is this: In Southern Peru, the Supreme

1 Court found it was not inappropriate to decline to
2 address the burden-shifting question before trial.
3 That was with respect to a burden-shifting device
4 where there was a factual dispute. In our case, there
5 is no factual dispute. There was a
6 majority-of-the-minority vote. There were no
7 disclosure claims. And there was a 2 to 1 margin on
8 that majority-of-minority vote. So perfectly
9 appropriate to decide the burden-shifting question
10 now.

11 THE COURT: Like even right now.

12 MR. ALLINGHAM: Yes.

13 THE COURT: Like, literally right now.

14 (Laughter)

15 MR. ALLINGHAM: With -- with respect
16 to the issue of burden, it is clear under any
17 procedural scenario that the burden to show a lack of
18 independence on the part of special committee member
19 is on the plaintiffs. As Your Honor pointed out, they
20 asked no questions.

21 THE COURT: How about this
22 accumulation of unnecessary de minimis questions that
23 your clients present?

24 MR. ALLINGHAM: I think --

1 THE COURT: What I think Mr. Stine's
2 point is, that there's -- each member of the committee
3 has something that at least the Court has to consider.

4 MR. ALLINGHAM: I, frankly, don't
5 agree with that, Your Honor. I don't think
6 Mr. Meister has even been argued to lack independence.
7 The allegations about Mr. Webb are legally
8 insufficient.

9 THE COURT: Well, Mr. Meister, I
10 suppose, just raises the new emerging question that's
11 going to exist in corporate governance, which is how
12 long can one be independent; right?

13 MR. ALLINGHAM: That is, is it a good
14 thing or a bad thing to have an experienced director?

15 THE COURT: No. I think that's a --
16 that's, as I would expect from you, a scintillatingly
17 fine dodge of the fundamental question --

18 (Laughter)

19 THE COURT: -- which is when human
20 beings do important and meaningful things together
21 over time, their relationships change. And I think
22 one of the emerging issues -- I agree the law hasn't
23 gone there yet; but it would be surprising to me for
24 an independent director to have the same relationship

1 with a manager and controlling stockholder after a
2 decade of such service that he or she did at the
3 beginning. It would actually creep me out to think
4 that people were so robotic that they would not
5 change. What you're saying is the law hasn't gone
6 there, and there's no, even, argument about
7 Mr. Meister; right?

8 MR. ALLINGHAM: There is no argument
9 about Mr. Meister.

10 THE COURT: And the only thing is he
11 has served as independent director in
12 Perelman-affiliated companies for over a decade now?

13 MR. ALLINGHAM: Yes. But as Your
14 Honor says, that's not an issue. I'm not going to
15 make the argument to the contrary, but it's not an
16 issue our law has ever gone to --

17 THE COURT: No. And neither -- even
18 with the -- and the Exchanges haven't even gone there.
19 Although they've gone in all kinds of interesting
20 places, this is not one place they have gone.

21 I mean, I suppose from our colonial
22 experience, you could say that, you know, we were
23 actually capable of being independent after over a
24 century of dependency. So ...

1 MR. ALLINGHAM: Your Honor had a
2 lively discussion with Mr. Stine about the
3 appropriateness of determining entire fairness
4 questions on summary judgment. We cite in our brief
5 the leading case on that, which is the Tanzer
6 decision. That's a case in which the burden had not
7 been shifted. The plaintiff -- sorry. The defendants
8 made a prima facie showing of fairness, and the
9 defendants failed to bring forward any evidence. The
10 Court entered summary judgment on the question of
11 entire fairness. And in various forms, that opinion
12 and that ruling have been cited in subsequent cases,
13 including Arnold versus Society for Savings.

14 The Celotex decision from the U.S.
15 Supreme Court supports the notion that a failure to
16 make a showing in the -- where there is -- where
17 there's an allegation of an absence of evidence on --
18 on which the plaintiffs bear a burden is adequate for
19 summary judgment.

20 THE COURT: No. I get that stuff.
21 And I think we're -- is there anything else you're --
22 you're metaphorically dying to say? Actually, if
23 you're literally dying to say, we -- we want to urge
24 you to choose life, but --

1 (Laughter)

2 MR. ALLINGHAM: Yes. Let me make one
3 final point, and that has to do with the inherent
4 coercion discussion. I think that the question of the
5 standard of review should address the particular
6 transaction facing the Court.

7 So what's the concern about inherent
8 coercion? It's not, obviously, that Mr. Perelman or
9 MacAndrews would dictate the terms of this
10 transaction. We know they're insulated from that.
11 It's not, obviously, the vote. We know they're
12 insulated from that. The question is -- the last
13 remaining question is this notion of inherent
14 coercion. And in this case -- and -- and -- and --

15 THE COURT: And the conundrum there
16 has to be intellectually -- what people are going to
17 say is "I know I can freely choose no without any
18 consequence" except the three -- when did the deal
19 close in relationship to the vote?

20 MR. ALLINGHAM: Very quickly.

21 THE COURT: Yeah. I mean, I'm
22 assuming, from experience, there's, like, a team that
23 makes sure things close so the business plan doesn't
24 change or something.

1 Is ... that even if you assume there's
2 a two-week delay or something like that, there's
3 appraisal right here; right?

4 MR. ALLINGHAM: Yes.

5 THE COURT: Yeah. But because it was
6 a merger vote, if I vote no, I get the transactional
7 consideration at the same time as everybody else in
8 the deal. So the only cost to me of hanging around
9 the vote is to delay between when I could have sold --

10 MR. ALLINGHAM: Which is a delay --
11 which is a -- which is a choice you have in any
12 transaction.

13 THE COURT: That's what I'm saying.
14 So the whole thing about inherent coercion has to be
15 it's not that I'm afraid that the controller -- that I
16 actually have to be around for the controller to
17 punish me, because I can freely vote no and still be
18 gone, thinking he'll punish me if I -- if the
19 transaction goes down, right. Or is it that if we all
20 vote -- if I know all of us vote no, the transaction
21 actually will go down and he'll be able to punish me?

22 MR. ALLINGHAM: And I think that is
23 the conjecture that -- that --

24 THE COURT: That if we all vote no,

1 then -- then Mr. Perelman is going to rise up and
2 engage in retributive acts, and we'll all be sorry,
3 and we'll get 14 bucks or some pathetic number down
4 the line.

5 MR. ALLINGHAM: Exactly. And that --
6 that is articulated as a possible perception on the
7 part of minority shareholders. It's a perception
8 that, frankly, makes no sense at all in this case.

9 The two specific examples, which Your
10 Honor has now talked about, you know, stop the
11 dividend payments, MFW never paid dividends. Okay,
12 let's do a retributive transaction at a lower price.
13 In this case the MacAndrews & Forbes Worldwide board
14 had already extracted an agreement from Mr. Perelman
15 that he would not buy above a certain level of stock,
16 below a majority, without giving notice to the board,
17 which gives the board the absolute power to do what it
18 needs to do if he's going to do some unfair act.
19 There is no reason for shareholders to perceive --

20 THE COURT: Well -- and I take it,
21 then -- what we're saying something about the
22 inadequacy of our law, too, if a controller, in the
23 wake of a no vote, attempts to do retributive acts,
24 what we would be saying is somehow our law has no

1 ability to constrain such duties -- breaches of the
2 duties of loyalty when they actually happen.

3 MR. ALLINGHAM: That's true, Your
4 Honor, although in Citron, the Court said it would
5 take you awhile to get your remedy for that unlawful
6 act. But my point is the board has absolute power to
7 stop that awful act that Mr. Perelman obviously isn't
8 contemplating, anyway. Why would a minority
9 shareholder, looking at a controller, who, for the
10 first time, has said "I'm walking away from influence
11 here. I'm walking away from influence on the vote.
12 I'm walking away from influence on the terms of the
13 transaction. I will let the chips fall where they
14 may. And if a deal I want to do doesn't get out of
15 the starting gate, okay"?

16 THE COURT: Well -- and what you're
17 saying is those conditions actually create an
18 environment where if the controller then attempts to
19 do something retributive, it can shine the light on
20 himself because you promised to let the committee say
21 no. You promised that you would abide by the
22 committee's decision, but now you've essentially, you
23 know, got a club in your hand and you're beating the
24 -- the -- the daylights out of people.

1 MR. ALLINGHAM: And my point is both
2 of these provisions, no dividend and the agreement,
3 were publicly disclosed. So were the conditions. No
4 rational minority shareholder would say under all of
5 those circumstances "I can't think of what it might
6 be, but I'm still afraid Mr. Perelman is going to do
7 something to me if I vote no." It's just not
8 rational.

9 Thank you, Your Honor.

10 THE COURT: Anything from the special
11 committee?

12 MR. MUNDIYA: No, Your Honor.

13 THE COURT: Well, thank you, and thank
14 you particularly to our reporter. Our students are
15 here and they're going to go somewhere else. I would
16 free the lawyers, and maybe I will talk to the
17 students for a couple minutes, and then they can go
18 down and enjoy their lunch without the presence of my
19 bald head. And -- but you guys do not -- you've
20 risen. You may leave. And so may Neith.

21 (Court adjourned at 1:10 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 146 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 15th day of March 2013.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

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